ADVICE ◇ EDUCATION ◇ DISCLOSURE ◇ ENFORCEMENT

2008
Advisory Opinions
Enforcement Actions

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

Included in this publication are:

State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 2008

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

In the Matter of John Doe, 2008 SEC (page number).

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

TABLE OF CASES

(By Subject or Respondent from 1979 through 2008)

(CASES WITHOUT PAGE NUMBERS WERE NOT PUBLISHED, BUT ARE AVAILABLE UPON REQUEST.)

State Ethics Commission
Enforcement Actions
2008

Summaries of Enforcement Actions
Calendar Year 2008

In the Matter of Kenneth Karlson - Former Rockland Conservation Commissioner Kenneth Karlson was ordered to pay a $2,000 civil penalty for violating the conflict of interest law by receiving $10,000 from a developer as compensation for excavation work Karlson performed on a project subject to an Order of Conditions issued by the Rockland Conservation Commission. According to the Ruling and Order, the Commission entered a decision against Karlson because of his failure to defend or otherwise respond to the allegations of an Order to Show Cause filed on October 17, 2007, by the Commission's Enforcement Division. The Order to Show Cause alleged that Karlson, while serving as a Conservation Commissioner, violated §17(a) of M.G.L. c. 268A, the conflict of interest law, by receiving $10,000 from the developer of a skating rink and parking lot project as compensation for Karlson's performance in the spring of 2005 of excavation work on the project to satisfy the grading requirements of an Order of Conditions issued by the Conservation Commission in August 2004. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in relation to any particular matter in which the municipality is a party or has a direct and substantial interest.

In the Matter of Harold Roeder - Former Georgetown Fire Chief Harold Roeder admitted to violating the state's conflict of interest law by leading the Georgetown Board of Fire Engineers to believe his private company would perform fire alarm wiring work pursuant to a Massachusetts Highway Department project involving the Fire Department in 2004. Roeder paid a civil penalty of $1,500. According to the Disposition Agreement, Roeder was the part-time Georgetown Fire Chief from 2002 to 2004. Roeder is also the president and owner of L.W. Bills Company, a private alarm sales and service company located in Georgetown. In 2003, the Massachusetts Highway Department planned to reconstruct portions of Main Street in Georgetown. This work required the Fire Department to relocate municipal alarm wiring impacted by the project. The Board of Fire Engineers, consisting of Roeder and four deputy chiefs, discussed the project at one of its meetings in early 2004. When a Board member suggested that the Fire Department request bids from local contractors to perform the work, Roeder said that L.W. Bills is on a state bid list and, therefore, the Fire Department did not have to put the work out to bid, or words to that effect. When Roeder made his statement, members of the Board of Fire Engineers believed that Roeder was indicating that there was no need to put the contract out to bid because Roeder's company would be selected as a state pre-approved vendor to perform the alarm wiring project. Section 23(b)(3) of the conflict law 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 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. By his statement to the Board of Fire Engineers, Roeder acted in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Roeder could be influenced as Fire Chief by L.W. Bills' possible interest in the Mass Highway contract. That is, a reasonable person would conclude that Roeder's comments were intended to facilitate the award of the contract to L.W. Bills. According to Roeder, his comments were not intended to indicate that L.W. Bills would be selected to perform the alarm project work. Roeder acknowledges, however, that such a comment could have given the appearance that L.W. Bills could unduly enjoy his favor in the performance of his Fire Department duties. Accordingly, Roeder violated G.L. c. 268A, section 23(b)(3).

In the Matter of Lawrence P. Driscoll - Former Middlesex Retirement Board ("MRB") member Lawrence P. Driscoll admitted to violating the state's conflict of interest law by (1) improperly awarding to his friend a $557,000 building renovation contract for the MRB's headquarters and failing to disclose the friendship; (2) subsequently voting to hire this friend as the headquarters facilities manager and failing to disclose the friendship; and (3) submitting improper expense reimbursement requests. Driscoll paid a $10,000 civil penalty and a civil forfeiture of $2,683. According to the Disposition Agreement, the MRB sought to renovate its headquarters in Billerica in 2002. The MRB created a three-person building subcommittee, which included Driscoll, and delegated to the subcommittee the handling of the headquarters renovation contract. Driscoll used his official position to award the contract to his friend John C. MacDonald. MacDonald was a builder who, at an October 5, 2002 MRB building subcommittee meeting, verbally submitted a bid of $557,000 to do the renovation. At that meeting, MacDonald also verbally submitted a bid of $595,000 on behalf of another builder. Driscoll knew that MacDonald had solicited and received the bid from the second builder prior to calculating his own bid. The subcommittee awarded the renovation contract to MacDonald at this same meeting. After the contract was awarded, the subcommittee instructed MacDonald to prepare and submit two written bids – his own bid and a second bid on behalf of the other builder. When the building project was completed, Driscoll and the other members of the subcommittee voted unanimously to hire MacDonald as the full-time manager of the facility. At no time did Driscoll file any disclosures regarding his friendship with MacDonald. In addition, during the period between 2002 and 2004, Driscoll requested expense reimbursements from the Middlesex Retirement System ("MRS") for conferences he did not attend, non-MRS-related airfare and other personal expenses, totaling $5,120. Driscoll has repaid the MRS $2,437. Section 23(b)(2) of G.L. c. 268A prohibits a state 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 not properly available to similarly situated individuals. Section 23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This subsection further provides that the appearance of impropriety can be avoided if the state employee publicly discloses all of the relevant circumstances which would otherwise create the appearance of a conflict of interest. By voting to award MacDonald the contract through a process that gave the false impression of being a competitive bid process, Driscoll used his official position to secure for McDonald an unwarranted privilege of substantial value not properly available to similarly situated individuals, and, therefore, violated G.L. c. 268A, § 23(b)(2). By submitting for reimbursement expenses that were not incurred in connection with legitimate MRB business, Driscoll used his official position to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals. By doing so, Driscoll violated G.L. c. 268A, § 23(b)(2). By failing to disclose his friendship with MacDonald in connection with the award of the building contract and the decision to hire MacDonald as the facility manager, Driscoll knowingly acted in a manner which would cause a reasonable person, knowing all of the relevant facts, to conclude that MacDonald could improperly influence or unduly enjoy Driscoll's favor in the performance of Driscoll's official duties as an MRB member. Thus, Driscoll violated G.L. c. 268A, § 23(b)(3).

In the Matter of Richard Bonovita – The Commission issued a Decision and Order dismissing its case alleging violations of the conflict of interest law by former Barnstable County Sheriff's Office Assistant Deputy Superintendent of Operations Richard Bonavita. The Commission's Decision and Order was based on the Enforcement Division's failure to file its Order to Show Cause within the three year statute of limitations period set forth in the Commission's regulations. In dismissing the case, the Commission did not make any determination as to whether Bonavita violated the conflict of interest law, but, rather, based its Decision and Order solely on procedural requirements. The Commission's regulation at 930 CMR 1.02(10) establishes a time limit in which the Commission's Enforcement Division may initiate an action based on the conflict law. It provides, "An order to show cause must be issued within three (3) years after a disinterested person learned of the violation." On January 31, 2008, the Commission's Enforcement Division filed an Order to Show Cause alleging that Bonavita repeatedly violated sections 23(b)(2) and 23(b)(3) of G.L. c. 268A, the state's conflict of interest law, by directing a Sheriff's Office mechanic to perform free automobile services for Bonavita and one of Bonavita's immediate family members. In an Answer filed on February 11, 2008, Bonavita denied the allegations and asserted that the Order to Show Cause had not been filed within the required three year period. Since the Commission learned of the matter involving Bonavita and the alleged automobile repairs on or before January 18, 2005, the deadline for the filing of the Order to Show Cause was January 18, 2008. The Enforcement Division's filing on January 31, 2008 was, therefore, time-barred. On March 28, 2008, a Joint Motion to Dismiss was filed by both parties on the grounds that the Order to Show Cause was filed beyond the applicable three year statute of limitations.

In the Matter of Julie C. Molloy – In a Decision and Order, the Commission approved a Disposition Agreement in which Sandwich Planning Board member Julie C. Molloy agreed to forfeit attorney's fees of $1,700 and pay a penalty of $1,300 for violating the state's conflict of interest law, G.L. c. 268A. In the Disposition Agreement, Molloy admitted that she had violated the conflict of interest law by appearing before the Sandwich Zoning Board of Appeals on behalf of her private law clients to oppose a special permit application after she had participated in her capacity as a Planning Board member in formulating comments on the same special permit application. Those comments were submitted by the Planning Board to the ZBA for its consideration in connection with its review of the special permit application. The Decision and Order concluded the public hearing in this matter. On December 5, 2007, the Commission's Enforcement Division initiated the public hearing process by issuing an Order to Show Cause alleging that Molloy had violated sections 17(a) and 17(c) of the conflict of interest law. According to the Disposition Agreement and Decision and Order, at a June 2006 Planning Board meeting, Molloy spoke in her capacity as a Planning Board member in opposition to a special permit application for the installation of two wind turbines. A week later, William and Angela LeBeau, who owned property abutting the site of the proposed wind turbine project, retained Molloy to act as their attorney in opposing the turbine project and paid her a $2,500 retainer. On the same day that she was retained by the LeBeaus, Molloy appeared on their behalf before the ZBA and opposed the wind turbine permit. After the ZBA approved the special permit application, Molloy filed an appeal with the Barnstable Superior Court on behalf of the LeBeaus. Soon thereafter, Molloy refunded to the LeBeaus the $800 balance of their retainer and concluded her representation. Section 17(a) of the conflict of interest law prohibits a municipal employee from receiving compensation from anyone other than the town in relation to a particular matter in which the town is a party or has a direct and substantial interest. Section 17(c) of the conflict of interest law prohibits a municipal employee from acting as an agent or attorney for anyone other than the town in connection with a particular matter in which the town is a party or has a direct and substantial interest. These sections apply less restrictively to municipal employees whose positions have been designated as "special municipal employee" positions for purposes of the conflict of interest law. Special municipal employees may represent clients before municipal boards other than their own unless they have officially participated in the matter, or unless the matter is or has been within the past year within their official responsibility. As a Planning Board member, a special municipal employee position, Molloy violated both of these sections of the conflict of interest law by representing the LeBeaus for compensation in opposition to the wind turbine special permit application, a matter in which Molloy had participated, and which was under her official responsibility, as a Planning Board member.

In the Matter of Joseph W. Daly – The Commission approved a Disposition Agreement on June 19, 2008, in which former Randolph Housing Authority Executive Director Joseph W. Daly ("Daly") admitted to violating the conflict of interest law by approving applications for housing where Daly and/or his father had financial interests, and for using his official position to secure unwarranted benefits for himself and others. Daly paid a $5,000 fine. According to the Disposition Agreement, Daly was the Randolph Housing Authority ("RHA") Executive Director from December 2002 to September 2004. The RHA owns approximately 256 housing units, and rents these units for less than fair market value to individuals who qualify on the basis of income. Beginning in September 2003, Daly participated in selecting Arthur and Mary Hilliard as RHA tenants, and then negotiated with the Hilliards to purchase their home on Oak Street in Randolph prior to the Hilliards' execution of their housing unit lease with the RHA. The Hilliards applied for a handicapped accessible housing unit, for which there was a wait list. Daly processed their application, and advised the Hilliards that if the trust that owned their home were to evict them, they could qualify for an immediate emergency placement into an RHA unit on the basis of imminent homelessness. The Hilliards were the sole trustees and beneficiaries of the trust that owned their home. In January 2004, the Quincy District Court issued an Execution Writ, evicting the Hilliards. Daly, in his capacity as RHA Executive Director, filed a copy of the Execution Writ with the Hilliards' application and selected the Hilliards for immediate placement, based on emergency circumstances. Daly decided against purchasing the home due to conflict of interest concerns, and his father, Edward Daly, a real estate developer and rental property owner, agreed to purchase the home for $200,000. Edward Daly purchased the home on March 19, 2004, the same date that the Hilliards took possession of their RHA unit. Edward Daly rehabilitated the Hilliards' home and sold it on December 13, 2004, for $395,000. Also according to the Disposition Agreement, in November 2003, Joseph Daly processed a tenant application for Judith Shultz, who, at the time, was a tenant of Edward Daly who was having difficulty paying her rent. Shultz was afforded an immediate placement into an RHA unit because she qualified for veteran's preference. She moved into an RHA unit in January, 2004, and Edward Daly was then able to rent his property to new tenants who could afford the rent. Section 19 prohibits a municipal employee from participating as such in any particular matter in which, to his knowledge, he or a member of his immediate family has a financial interest. Daly had a financial interest in processing the Hilliards' tenant application and lease agreement because the Hilliards needed to obtain RHA housing in order to be able to sell their home to Daly. Daly's father also had a financial interest in these matters because the Hilliards' occupancy of an RHA unit allowed the Hilliards to sell their property to him. Daly violated § 19 of the conflict of interest law by participating in his capacity as RHA Executive Director in matters in which, to his knowledge, he and/or his father, an immediate family member, had financial interests. Daly also violated § 19 by participating in his capacity as RHA Executive Director in Judith Shultz' tenant application. Daly knew that his father had a financial interest in this matter because he knew that Shultz was his father's tenant and was having difficulty making her rent payments. 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. According to the Disposition Agreement, Daly's opportunity to purchase the Hilliards' property was a privilege. By negotiating with the Hilliards to buy their property and later offering to substitute his father in the transaction while the Hilliards' application was pending, Daly used or attempted to use his official position to secure an unwarranted privilege for himself and/or his father. This privilege was of substantial value, as evidenced by the profit realized by Edward Daly on the subsequent sale of the property. This privilege was unwarranted because, while the purchase and sale negotiations were taking place, the Hilliards were subject to Daly's official authority or regulatory jurisdiction. The Hilliards' emergency placement in an RHA unit was also a privilege. This privilege was unwarranted because the Hilliards did not meet the criteria for emergency placement, and Daly knew this. Daly used his RHA position to secure this privilege for the Hilliards. Daly did not publicly disclose to his appointing authority, the RHA board, his private dealings with the Hilliards.

In the Matter of P.A. Landers - The Commission approved a Disposition Agreement in which P.A. Landers, Inc. admitted to violating the conflict of interest law through the actions of its employee, who made illegal reimbursement payments for gasoline expenses to a Massachusetts Highway Department ("MassHighway") construction inspector. P.A. Landers, Inc. paid a $10,000 civil penalty. In two related matters, on April 8, 2008, the Commission's Enforcement Division initiated public adjudicatory proceedings against Terry Edwards, the P.A. Landers, Inc. employee, and Thomas Kennedy, the MassHighway inspector. According to the Disposition Agreement, P.A. Landers, Inc. ("P.A. Landers") had a construction contract with MassHighway to supply asphalt for work on Route 44 near Plymouth. MassHighway Construction Inspector Thomas Kennedy was responsible for inspecting P.A. Landers' work and for submitting the paperwork necessary to approve payments to P.A. Landers under the contract. Terry Edwards was the P.A. Landers project manager for the contract. In March 2002, Kennedy approached Edwards and asked for reimbursement for his vehicle gasoline expenses. Edwards agreed to provide the reimbursement so that Kennedy's inspections would "go a little smoother" on the project. From May 2002 until November 2002, Edwards made payments to Kennedy which averaged about $200 every other week, and ultimately totaled between $2,000 and $3,000. Edwards made these payments to Kennedy with P.A. Landers funds, which he obtained by submitting Kennedy's receipts, along with his own, to the company for reimbursement from the company's petty cash fund. Edwards' reimbursement requests to P.A. Landers did not identify Kennedy as the recipient of the funds and were made contrary to company policies regarding the distribution of funds. Section 3(a) of G. L. c. 268A, the conflict of interest law, prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving anything of substantial value to any state employee for or because of any official act performed or to be performed by the state employee. "Substantial value" has been determined to mean anything with a value of $50 or more. Through its employee, P.A. Landers gave Kennedy between $2,000 and $3,000 in cash payments. Each payment was greater than $50, and so was of substantial value. These payments were not as provided by law for the proper discharge of official duty. P.A. Landers gave these payments to Kennedy to induce him to not delay, and/or to reward him for not delaying, the processing of paperwork necessary for P.A. Landers to receive payment for its work on the project. Kennedy's timely processing of paperwork involved official acts performed or to be performed by Kennedy. Therefore, P.A. Landers violated section 3(a) by giving cash payments of substantial value to a state employee for or because of official acts performed or to be performed by the state employee. While P.A. Landers maintains that Edwards' payments to Kennedy were contrary to company policy and were accomplished only by Edwards circumventing established safeguards regarding the distribution of funds, the company acknowledges that as a business organization, it acts through, and is responsible for, the conduct of its employees, even if the conduct is unauthorized.

In the Matter of James M. Ruberto - The Commission issued a Public Education Letter ("PEL") to Pittsfield Mayor James M. Ruberto for holding two political events in public buildings. The Commission found reasonable cause to believe that Ruberto violated Section 23 of the Conflict of Interest Law, and issued a PEL in lieu of initiating public adjudicatory proceedings. According to the PEL, on October 31, 2006, Ruberto held a press conference at Pittsfield City Hall to endorse a state senate candidate. Ruberto directed his aide, a municipal employee working on municipal time, to make the arrangements for the press conference, which lasted approximately 15-25 minutes. The second political event occurred on November 1, 2006, at Pittsfield High School. A representative of the Deval Patrick for Governor campaign contacted Ruberto and suggested a town hall style campaign event where high school students could ask the candidate questions. Ruberto sought and received permission from the school superintendent to hold the event at the high school. Ruberto then directed his aide to work with the superintendent and campaign representatives to arrange the event. Ruberto invited political "VIPs" and local public officials to the event. The event lasted about 30 minutes, and campaign or political speeches were made by Ruberto, Congressman John Olver, State Senate candidate Ben Downing and gubernatorial candidate Deval Patrick. Some members of the audience, which included teachers, administrators and about 150 students, held campaign signs. No one was allowed to ask any questions. The PEL identified public resources improperly used in connection with the second event as including public time spent by city employees to arrange the event, and public time spent by building department employees, who were directed to repair the front stairs of the high school, parks department employees, who were directed to clean the school grounds, and school custodians, who were directed to clean and buff floors, in preparation for the event. The PEL states that while public buildings may be used by private groups for private events, usually a fee is paid for the use of the facilities. In this case, the Patrick campaign was not billed for the event, nor was the public building made available to the campaign pursuant to an existing policy. Section 23(b)(2) prohibits a public official from knowingly or with reason to know using or attempting to use his official position to secure for himself or others unwarranted privileges of substantial value, which are not properly available to similarly situated individuals. The Commission found reasonable cause to believe that Ruberto violated the conflict law by, in his capacity as Mayor, directing his aide to set up the press conference at which he endorsed Senate candidate Downing, and by using city resources to hold the press conference and to send out the press notice. In connection with the second political event, Ruberto violated Section 23(b)(2) by allowing public resources to be used in connection with what was essentially a partisan political rally, and in connection with the endorsement of various candidates running for public office.

In the Matter of Lincoln Smith - The Commission issued a Decision and Order finding that Boston City Council Assistant Research Director Lincoln Smith violated G.L. c. 268A, the conflict of interest law, by invoking his City Council position and the powers associated with the Boston City Council in connection with a claim against a parking service company for damage to his personal vehicle. Smith was fined $1,000 for the violation. According to the Decision and Order, on November 17, 2005, Smith used a parking valet service operated by VPNE Parking Solutions, (VPNE) to park his vehicle at Brigham and Women's Hospital in Boston. When a VPNE employee returned the vehicle, Smith pointed out a long scratch beginning at the front door and extending to the rear door. The VPNE employee denied that the damage occurred at their facility, and Smith then asked to speak to a supervisor. Two VPNE managers met with Smith, told him they would not make a decision at that time regarding liability for the damage, and advised him to pursue a damage claim through his insurance company. The Decision and Order determined that testimony taken during the adjudicatory hearing "makes clear that Smith invoked his employment relationship with the City Council." When the VPNE managers would not make a decision regarding liability, Smith became agitated and told the managers that he was "on the Boston City Council", and that he was "cognizant" of the parking issues in the hospital area. He also told them that the hospital would need a lot of permits, and that "permits have to come through my desk in my office." Based on Smith's statements, the managers believed that Smith was a City Councilor and that he could take actions that could negatively affect VPNE's contract with Brigham and Women's Hospital, and/or Brigham and Women's Hospital. Section 23(b)(2) of the conflict of interest law prohibits a public employee from using or attempting to use his position to secure for himself or others an unwarranted privilege of substantial value not properly available to similarly situated individuals. Although Smith was not in fact a City Councilor, his invocation of his employment relationship with the Boston City Council by virtue of his position as Assistant Research Director, was a use of his official position. Accordingly, by invoking his City Council position and the powers associated with the Boston City Council during the negotiations concerning a damage claim involving his car, Smith violated this section of the law.

In the Matter of Edward Drew - The Commission fined former Waltham Police Chief Edward Drew $1000 for violating the state conflict of interest law by involving himself in an internal police department selection process to appoint three background investigators while his daughter, Officer Jennifer Vadnais, was an applicant for one of the positions. According to the Disposition Agreement, the selection process took place in the fall of 2005 under the direction of Deputy Police Chief Paul Juliano. Officer Vadnais was not chosen for any of the three positions. On November 23, 2005, once the applicants chosen for the three positions were notified that they had been selected, Drew contacted Juliano to express concerns about the selection process. Drew questioned why applicants not selected, including his daughter, were told they had insufficient seniority, while other officers with the same seniority had been solicited to apply for the positions. Drew also questioned why an officer solicited to apply for a position received an assurance that the officer would be selected, even though the officer had not submitted an application. Drew also pointed out to Juliano that some officers who were solicited to apply for the positions had not submitted significant reports or been involved in noteworthy investigations, whereas some of the officers not selected had such experience. The Disposition Agreement notes that Drew did not direct Juliano to take any specific action regarding the background investigator appointments, but that Juliano told Drew at the end of their conversation that he planned to eliminate one of the positions and therefore rescind one of the appointments. 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. By contacting the deputy police chief to express concerns about the selection process in which Drew's daughter was an applicant, Drew attempted to use his official position to secure a benefit of substantial value for his daughter. That benefit was unwarranted because the conversation with the deputy police chief could have had the effect of having the deputy police chief select the chief's daughter for a position even though the selection decisions had already been made. Therefore, according to the Disposition Agreement, Drew violated §23(b)(2)

In the Matter of Michael J. O'Toole - The Commission issued a Decision and Order dismissing its case alleging violations of the conflict of interest law, G.L. c. 268A, by former Executive Office of Public Safety ("EOPS") Assistant Secretary Michael J. O'Toole. The Decision and Order was based on the Enforcement Division's failure to file its Order to Show Cause ("OTSC") within the three year statute of limitations period set forth in the Commission's regulations. In dismissing the case, the Commission did not make any determination as to whether O'Toole violated the conflict of interest law, but, rather, based its Decision and Order solely on procedural requirements. The Commission's Enforcement Division filed an OTSC on January 19, 2007, alleging that O'Toole repeatedly violated Section 6 of the conflict of interest law by approving payments to municipal police departments that were clients of Crest Associates, Inc. ("Crest") at a time when O'Toole was negotiating and/or had an agreement for employment with Crest. The OTSC also alleged that O'Toole violated Section 5(a) by, as a Crest employee, writing a quarterly financial report for a police department that had received an EOPS grant that O'Toole approved while at EOPS. The Enforcement Division did not learn about O'Toole's alleged conduct until about January 26, 2004, less than three years before the OTSC was issued. On October 18, 2007, O'Toole filed a motion for summary decision to dismiss all claims made by the Enforcement Division. The Commission's regulation at 930 CMR 1.02(10) establishes a time limit in which the Enforcement Division may initiate an action based on the conflict of interest law. It provides, "An order to show cause must be issued within three (3) years after a disinterested person learned of the violation." In its Decision and Order, the Commission found that, as a result of extensive media coverage, the relevant events were a matter of general knowledge in the community more than three years before the OTSC was issued. The Commission further found that such media coverage should have triggered a duty to inquire on the part of the Enforcement Division, and, therefore, the Enforcement Division knew or should have known of the relevant events more than three years before the OTSC was issued. Accordingly, the OTSC was not timely issued, and the case was dismissed. According to the Decision and Order, O'Toole offered copies of more than twenty news stories that appeared between October 30, 2003 and January 20, 2004 as proof that his conduct allegedly in violation of G. L. c. 268A was a matter of "general knowledge in the community" more than three years before the OTSC was issued. Although none of the news stories focused specifically on O'Toole, they identified him by name, described his former work for EOPS and his current work for Crest, and placed him in the middle of a controversy and investigation concerning the awarding of public safety grants by EOPS to Crest's clients prior to and after his service as EOPS grants director. The Decision and Order states that the news articles, "contained sufficient relevant information about Respondent's conduct which is the subject of the [OTSC], and were widely and prominently enough published to have made 'the relevant events' concerning Respondent's alleged violations 'a matter of general knowledge in the community' within the meaning of 930 CMR 1.02 (10)(d), in late December 2003 and early January 2004, more than three years before the [OTSC] issued." Furthermore, although the Enforcement Division did not actually read the media reports until late January 2004, the Commission stated that these reports were available to the Enforcement Division beforehand, and should have caused the Enforcement Division to make inquiries concerning potential violations by O'Toole.

In the Matter of Joseph Maglione - The Commission issued a Decision and Order in its case against Revere Water and Sewer Department Water Facilities Director Joseph Maglione in which it concluded that the Commission's Enforcement Division did not prove by a preponderance of the evidence that Maglione had violated G.L. c. 268A, the conflict of interest law. The Commission's Enforcement Division alleged in December 2007 that Maglione violated G.L. c. 268A, §§ 2(b), 3(b), 23(b)(2) and 23(b)(3) by soliciting and accepting money from City of Revere Department of Public Works Sewer Department Foreman Randy Adamson and Drain Department Foreman Anthony Giannino in connection with their work on private water and sewer projects in the city. This action against Maglione followed the resolution of cases against Adamson and Giannino in which they each entered into Disposition Agreements with the Commission. In those agreements, Adamson and Giannino each admitted that they violated § 17(a) of the conflict of interest law by receiving compensation for private work in the city where the city had a direct and substantial interest in that work, and § 2(a) for paying bribes to Maglione. Adamson and Giannino each paid $8,000 fines. The adjudicatory hearing in the Maglione case included five days of testimony, during which 27 witnesses testified, including Adamson, Giannino and Maglione. According to the Decision and Order, the resolution of the matter depended "on an assessment of the credibility of the witnesses." The Commission found "... that the testimony of Giannino and Adamson with regard to the bribes was not entirely credible with respect to certain key points. We find that the allegations have not been proven by a preponderance of the evidence, and therefore find in favor of the Respondent."

In the Matter of Joseph Slattery - The Commission issued a Disposition Agreement in which former Southampton Board of Health member Joseph Slattery admitted to violating the conflict of interest law by holding multiple municipal positions and by accepting appointment by his own Board to a position supervised by that Board. Slattery paid a $4,000 fine. According to the Disposition Agreement, Slattery has been the Town of Southampton's paid, full-time Water Department Superintendent since 1996. From 1999 until January, 2008, Slattery also served as an unpaid elected member of the town's Board of Health ("BOH"). In January, 2005, the BOH appointed Slattery to the position of paid BOH health agent, and he served in that position until January 2008. The BOH health agent position was supervised by the BOH. Section 20 of the conflict of interest law prohibits a municipal employee from having a financial interest in a contract made by his municipal employer. Slattery's acceptance of an appointment as paid health agent, when he was already the Southampton Water Department Superintendent and a Board of Health member, gave him a financial interest in a town contract. While certain exemptions are available under § 20 to allow municipal employees to have financial interests in town contracts in some circumstances, there is no exemption that would permit Slattery to hold both the full-time Southampton Water Department Superintendent position and the part-time, paid Southampton Board of Health health agent position. Therefore, by holding both positions, Slattery violated § 20. Section 21A of the conflict of interest law prohibits a member of the Board of Health from being eligible for appointment or election by the members of the board to any office or position under the supervision of the board, unless the appointment has first been approved at an annual town meeting. At no time did the Southampton town meeting approve of Slattery's appointment as health agent. Therefore, by accepting the appointment as health agent while serving on the Board of Health, Slattery also violated § 21A.

In the Matter of Charles Lincoln – The Commission issued an Order terminating public proceedings against former Brockton Police Officer Charles Lincoln. In its Order, the Commission concluded that Lincoln's alleged conduct - falsely calling in sick to one public job so that he could work at another public job - did not amount to a use of his official position in violation of G.L. c. 268A, the conflict of interest law. The Commission's Enforcement Division issued an Order to Show Cause (OTSC) on March 15, 2007, alleging that Lincoln repeatedly violated § 23(b)(2) of the conflict of interest law, which prohibits a public employee from using or attempting to use his official position to secure for himself or others an unwarranted privilege of substantial value not properly available to similarly situated individuals. The OTSC alleged that Lincoln was a Brockton police officer from 1972 until January 2004, and also the full-time Plymouth County Sheriff's Department Director of Security at the Plymouth County Correctional Facility between January 2001 and January 2004. It further alleged that: on 155 occasions, Lincoln called in sick to work to one of his two public jobs in order to work at the other public job; during the three years that Lincoln was employed simultaneously by both departments, he used a total of approximately 251 sick leave days, 222 from Brockton and 29 from Plymouth County, claiming he was sick, injured or caring for ill members of his family; on 148 of the days Lincoln called in sick in Brockton, he worked a full shift in Plymouth; and on seven of the days he called in sick in Plymouth, he worked a full shift in Brockton. On August 1, 2008, the Commission ordered the parties in this matter to submit briefs on the question of whether, by engaging in the conduct alleged in the OTSC, a municipal or county employee uses or attempts to use his official position within the meaning of § 23(b)(2). After reviewing the briefs, the Commission determined that the conduct alleged in the OTSC did not amount to a use of official position and issued an Order terminating the adjudicatory proceeding. According to the Order, "[o]rdinary time and attendance fraud, absent any additional aspects, …, does not amount to a use of official position in violation of the conflict of interest law. Such matters are best dealt with by employers through disciplinary or other employment-related action, not as violations of the conflict of interest law."

In the Matter of Mark Weissman - The Commission approved a Disposition Agreement in which state Marine Fisheries Advisory Commission ("MFC") member Mark Weissman admitted to violating the conflict of interest law by participating officially as an MFC member in matters of interest to the Alliance to Protect Nantucket Sound ("Alliance"), while having a private business relationship with the Alliance. Weissman paid a $2,500 civil penalty. According to the Disposition Agreement, Weissman has served as an unpaid member of the MFC since he was appointed by the Governor in 1993. In 2001, Cape Wind Associates proposed to construct a wind farm consisting of approximately 130 wind turbines in

Nantucket Sound. Cape Wind Associates sought numerous permits and approvals from state and federal authorities. The Alliance is a non-profit environmental organization dedicated to the long-term preservation of Nantucket Sound. The Alliance was formed in 2001 and has been the central opponent of the Cape Wind Project (the "Project"). On several occasions from 2002 through 2007, Weissman participated as an MFC member relative to the Project by requesting that the MFC send letters to other agencies or by testifying before federal or state agencies reviewing the project. In 2003, Weissman began providing paid consultant services to the Alliance. Since 2003, Weissman received approximately $48,000 for various work performed for the Alliance, of which approximately $8,000 was in relation to the Alliance's efforts to oppose the Project. Of this $8,000, the Alliance paid Weissman more than $2,000 for reviewing and formulating comments regarding joint environmental review documents published by the Army Corps of Engineers, the Massachusetts Environmental Policy Act office, and/or the Cape Cod Commission. Section 4(a) of G.L. c. 268A, the conflict of interest law, prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from receiving or requesting compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Section 4(a) applies less restrictively to special state employees. MFC members are special state employees. A special state employee is subject to the prohibitions of § 4(a) only in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Weissman participated as an MFC member in matters pertaining to the Project. By also receiving over $8,000 from the Alliance for his services in connection with the Alliance's opposition to the Project, Weissman violated § 4(a). Section 23(b) (3) of the conflict of interest law 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 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 it shall be unreasonable to so conclude if the public employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion. Weissman repeatedly participated as an MFC member in matters of interest to the Alliance while he had a significant private business relationship with the Alliance. By so participating, Weissman acted in a manner which would cause a reasonable person, knowing all the relevant circumstances, to conclude that the Alliance could improperly influence Weissman in the performance of his official duties. While Weissman verbally discussed his consultant activities for the Alliance at MFC meetings, at no time did he make a written disclosure to the Governor, Weissman's appointing authority, of his paid consulting relationship with the Alliance. Therefore, Weissman violated § 23(b) (3).

In the Matter of Olimpia Palazzola - The Commission approved a Disposition Agreement in which former Gloucester School Committee ("School Committee") member Olimpia Palazzola admitted to violating the conflict of interest law, G.L. c. 268A, and agreed to pay a $2,000 civil penalty. According to the Disposition Agreement, Palazzola was an elected member of the School Committee from January, 2006 to December, 2007. Palazzola's son, Keith, was a special education teacher at Gloucester High School ("high school"). On April 9, 2007, Keith and his supervisor had a verbal confrontation. Keith telephoned Palazzola about the altercation, which he described as harassment, and requested that Palazzola come to the high school. Palazzola went to the high school and asked the supervisor to explain the situation. Palazzola was not satisfied with the explanation. As she left the meeting, Palazzola stated, "the harassment has to stop." That same morning, the high school principal was scheduled to meet with Keith regarding a pending personnel matter. Palazzola attempted to sit in on the meeting, but was directed to leave by the principal. While waiting outside the meeting room, Palazzola contacted the school superintendent and assistant school superintendent and requested that they attend the meeting, stating that Keith was being harassed by the high school administration. Palazzola was able to speak to the assistant superintendent prior to him going into the meeting, and she explained what she believed to be the history of Keith being harassed. After Keith's meeting, Palazzola met with the superintendent and assistant superintendent for about an hour in the superintendent office, where she spoke about her belief that Keith and other high school teachers were being harassed by the high school administration. Palazzola asked the superintendent to look into the matter because she was worried about Keith's health. 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 other than the municipality, in connection with any particular matter in which the same municipality is a party or has a direct and substantial interest. Palazzola acted as Keith's agent by appearing at the high school on April 9, 2007, at Keith's request, and confronting his supervisor prior to the high school administration's meeting to discuss Keith's personnel issue; and by meeting with the superintendent and assistant superintendent to discuss Keith's harassment claim against the high school administration. Therefore, Palazzola violated § 17(c).

In the Matter of Robert K. Coughlin - The Commission approved a Disposition Agreement in which former state Undersecretary for Business Development ("Under-secretary") Robert Coughlin admitted to violating § 23(b)(3) of G.L. c. 268A, the Conflict of Interest Law, by repeatedly participating officially as Undersecretary in matters of interest to the Massachusetts Biotechnology Council ("MBC") after Coughlin had applied for the position of MBC President. Coughlin paid a $10,000 civil penalty. According to the Disposition Agreement, Coughlin was Undersecretary for Business Development within the Executive Office of Housing and Economic Development ("EOHED") from late January 2007 until August 31, 2007. Coughlin's duties included encouraging companies to stay or expand in, or move to, Massachusetts. Coughlin supervised six departments, including the Massachusetts Office of Business Development ("MOBD"). MOBD assisted Massachusetts companies and companies considering relocating to Massachusetts in obtaining grants and loans from various state agencies, and in dealing with permitting issues at the state and local levels. MOBD's Division of Life Sciences specialized in providing these services to the life sciences industry. The MBC is an association of more than 550 dues-paying members, including biotechnology companies, academic institutions and others involved in the biotechnology industry. The MBC lobbies the legislative or executive branch of government on issues of importance to its members. During Coughlin's tenure as EOHED Undersecretary, MOBD was integrally involved in developing the $1 billion Life Sciences Initiative ("LSI"), an issue of major importance to the MBC. The LSI was announced by the Governor on May 8, 2007, and life sciences legislation was filed on July 19, 2007. On January 9, 2007, the MBC presidency became vacant. The MBC formed a Search Committee to find a new president. The Search Committee was assisted by MBC senior staff and a recruiting firm. Coughlin indicated to MBC senior staff that he was interested in being considered for the MBC presidency, and on April 1, 2007, Coughlin e-mailed his résumé to an MBC senior staff person, with the understanding it would be passed on to the Search Committee. On several occasions thereafter, including during interviews with the Search Committee and recruiter, Coughlin communicated his interest in the MBC president's position. Coughlin was informed that he would be formally interviewed by the Search Committee on July 31, 2007. In mid-July, 2007, after consulting with private legal counsel, Coughlin orally advised the Governor's staff of his scheduled MBC interview, and on July 24, 2007, Coughlin filed two disclosure forms with the Governor and the State Ethics Commission. The Search Committee interviewed Coughlin and three other finalists on July 31, 2007. In early August 2007, the Search Committee offered the position to Coughlin, and he accepted the offer on August 10, 2007. Coughlin began his MBC job on September 4, 2007, at an annual salary of $350,000. According to the Disposition Agreement, during the period that Coughlin was an applicant for the MBC presidency, Coughlin, in his capacity as Undersecretary, met with: MBC senior staff on a regular basis to discuss matters of interest to the MBC or its members; the Governor and MBC representatives regarding the LSI; EOHED staff, MBC employees and MBC-member company representatives to formulate tax proposals for the LSI; senior management of MBC-member company Cubist Pharmaceuticals ("Cubist") to discuss Cubist's proposals for the tax component of the LSI; and GTC Biotherapeutics ("GTC") representatives to discuss GTC's interest in applying for financial and other support from EOHED at a time when GTC's CEO was a member of both the MBC Executive Committee and the MBC Search Committee. Section 23(b) (3) of G.L. c. 268A, in relevant part, 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. The section further provides that it shall be unreasonable to so conclude if such state employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion. As stated in the Disposition Agreement, "[b]y submitting his résumé for the MBC presidency on April 1, 2007, and subsequently repeatedly acting in his official capacity as EOHED Undersecretary in matters in which the MBC had a significant interest, [and] by subsequently acting in his official capacity as EOHED Undersecretary in meeting with a senior official of an MBC-member company regarding that company's interests before the EOHED, while that official was on the MBC Presidency Search Committee, Coughlin 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 MBC could unduly enjoy his favor in the performance of his official duties. In so acting, Coughlin repeatedly violated § 23(b) (3)." Coughlin failed to make a timely written disclosure of the relevant facts to the Governor, his appointing authority. Coughlin's disclosures were filed on July 24, 2007, after he had repeatedly acted in his official capacity as just described above, and well after April 1, 2007, the date on which he had submitted his résumé to the MBC for consideration.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 07-0027

IN THE MATTER OF
KENNETH KARLSON

RULING AND ORDER ON MOTION FOR SUMMARY DECISION

Appearances:	Karen Beth Gray, Esq. Counsel for Petitioner
Commissioners:	Daher, Kane, Kempthorne, Veator
Presiding Officer:	Commissioner Jeanne M. Kempthorne

On December 7, 2007, Petitioner, the Enforcement Division of the State Ethics Commission, filed a Motion for Summary Decision and Order Cancelling the January 7, 2008 Adjudicatory Hearing. As grounds for the motion for summary decision, Petitioner stated that an Order to Show Cause was filed on October 17, 2007, and that Respondent, Kenneth Karlson, had failed to file an Answer.[1]

Pursuant to 930 CMR 1.01(6)(f),[2] the full Commission may enter a summary decision in favor of the Petitioner when the record discloses a Respondent's failure to file required documents, respond to notices or correspondence, or comply with orders of the Commission or a Presiding Officer, or when the record otherwise indicates a substantial failure to cooperate with an adjudicatory proceeding.

On January 2, 2008, pursuant to 930 CMR 1.01(6)(f), the Presiding Officer ordered Karlson to file an Answer by January 11, 2008, or otherwise show cause why a summary decision should not be entered against him. The order provided that if Karlson failed to do so by January 11, then the Commission would consider whether summary decision should be entered against him during its meeting on January 16, 2008.

Karlson did not file an Answer by January 11, 2007, and he otherwise has failed to show cause why summary decision should not be entered against him. The record therefore warrants the entry of a summary decision.

The OSC alleges that in the summer of 2004, as a member of the Rockland Conservation Commission, Karlson addressed an application by the Massachusetts Sports Club to construct a skating rink and parking lot. In August 2004, the Conservation Commission allegedly issued an Order of Conditions that included grading requirements. Petitioner alleges that the developer of the project, who had appeared before the Conservation Commission as an engineer in connection with the matter, hired Karlson in the spring of 2005, and that Karlson performed excavation work to satisfy the grading requirements in the Order of Conditions. The Order to Show Cause alleges that Karlson violated G.L. c. 268A, section 17(a)[1] by receiving $10,000 from the developer as compensation for this work.

Because of Respondent's failure to defend or otherwise respond to the allegations, we conclude that Respondent has violated section 17(a). We regard the alleged conduct as a serious violation because Karlson received compensation in connection with a matter under the jurisdiction of his own board. Accordingly, we find that the maximum statutory fine of two thousand dollars ($2,000) is warranted.

Pursuant to G.L. c. 286B, section 4(j)(3), we hereby ORDER the Respondent, Kenneth Karlson, to pay the Commission a civil penalty of two thousand dollars ($2,000) within thirty days of receipt of this ruling.

DATE AUTHORIZED: January 16, 2008
DATE ISSUED: January 16, 2008

---

[1] Under 930 C.M.R. section 1.01(5)(b), an Answer was due within twenty-one days of the issuance of the OSC, or by November 7, 2007. Karlson did not file an Answer either by that date or by or after November 13, 2007, when a Pre-Hearing Conference was held in this matter.

[2] 930 C.M.R. 1.01(6)(f) provides as follows:

> 1. Any Party may with or without supporting affidavits move for summary decision in his favor, as to all or part of a matter. If the motion is granted as to part of the matter and further proceedings are necessary to decide the remaining issues, a hearing shall be so held. Such a motion may be granted only by the Commission.
>
> 2. When the record discloses the failure of the Respondent to file documents required by 930 CMR 1.00 et seq., to respond to notices or correspondence, or

to comply with orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the Adjudicatory Proceeding, the Presiding Officer may issue an order requiring that the Respondent show cause why a summary decision should not be entered against him/her. If the Respondent fails to show such cause, a summary decision shall be granted only by the Commission, shall be a Final Decision, and shall be made in writing as provided in 930 C.M.R. 1.01(9)(m).

[3] G.L. c. 268A, section 17(a) provides, "No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0003

IN THE MATTER OF
HAROLD ROEDER

DISPOSITION AGREEMENT

The State Ethics Commission and Harold Roeder 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 Roeder. The Commission concluded its inquiry and, on April 25, 2007, found reasonable cause to believe that Roeder violated G.L. c. 268A.

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

Findings of Fact

1. Roeder served as the Georgetown Fire Department ("the Fire Department") deputy chief from May 1998 to April 2002. In April 2002, he was elected the Fire Department chief by a vote of the Georgetown Board of Fire Engineers.

2. The Georgetown Board of Fire Engineers is responsible for the administration of the Fire Department; it meets once per month and consists of the fire chief and four deputies. The Fire Department consists of part-time volunteer firefighters who hold other full time jobs.

3. At all times relevant to the matters before the Commission, Roeder was the president and owner of B&B Engineering Corporation, which also does business as L.W. Bills, Company ("L.W. Bills"), an alarm sales and service company located in Georgetown. He also worked as a paid employee of that company.

4. On July 1, 1999, the Massachusetts Executive Office for Administration and Finance Operational Services Division awarded L.W. Bills a statewide contract to provide firefighting, forestry, emergency medical, rescue equipment and supplies to state departments, cities, towns and political subdivisions. This designation allows covered state and municipal agencies to hire vendors on the statewide contract without putting certain contracts out for public bid. On March 27, 2003, L.W. Bills was awarded another statewide contract, extending its eligibility to provide no-bid services for 24 months.

5. L.W. Bills had performed emergency repair and maintenance work on the Georgetown Fire Department's alarm system since 1968. The extent of the services provided during any year varied greatly, and none were provided pursuant to L.W. Bills' statewide contracts. However, in 2000, L.W. Bills performed work for the Georgetown Police Department pursuant to its statewide contract.

6. In 2003, the Massachusetts Highway Department ("Mass Highway") planned to reconstruct portions of Main Street in Georgetown. This work required the town to upgrade and/or relocate its fire alarm distribution facilities, which Mass Highway would pay for, in part with federal funds.

7. On October 23, 2003, Mass Highway notified the Fire Department of the impending construction and requested an estimate for the Fire Department's portion of the work, which involved relocating the municipal alarm wiring that would be impacted by the

telephone poles being moved to accommodate the street widenings.

8. In or about February 2004, L.W. Bills provided the Fire Department with an estimate of the costs of labor and material to complete the project. On February 17, 2004, the Fire Department, incorporating the figures provided by L.W. Bills, submitted the required estimate to Mass Highway in response to its request. Consistent with common business practice in this industry, L.W. Bills did not charge for the services related to the estimate.

9. The Board of Fire Engineers discussed the Main Street fire alarm project at one of its meetings in early 2004. At such time, a Board member suggested that the Fire Department request bids from local contractors to perform the work. In response, Roeder said that L.W. Bills is on a state bid list and therefore we don't have to put the work out to bid, or words to that effect. When Roeder made his statement, certain members of the Board of Fire Engineers believed that Roeder was indicating that there was no need to put the contract out to bid because L.W. Bills would be selected off the state vendor list to perform the alarm project.

10. At the February 2004 meeting of the Board of Fire Engineers, Roeder notified the Board that he intended to retire from the Fire Department effective April 30, 2004.

11. On March 8, 2004, Mass Highway sent contract documents for the project to the Georgetown Fire Department to be signed by the proper authorities. Three Fire Department deputies signed the contract, but Roeder did not sign the document.

12. On April 27, 2004, Mass Highway sent a Notice to the Fire Department to proceed with the alarm project in accordance with the terms and conditions of the contract.

13. The contract between the Fire Department and Mass Highway allowed for the Fire Department to choose one of three options to accomplish the fire alarm system work: by designating its own forces; by selecting a contractor who is the lowest qualified bidder based upon an appropriate solicitation; or, by a continuing contract subject to approval of Mass Highway under which certain work is regularly performed for the Fire Department (i.e., a designated pre-approved vendor).

14. On April 30, 2004, Roeder retired from the Fire Department and Deputy Chief John Durkee became the Fire Department Chief. In or about June 2004, it became clear to Durkee that although the alarm relocation work needed to commence shortly, there was no written contract in place between the Fire Department and any vendor to do the work.

15. In August 2004, the town arranged with the Georgetown Light Department to perform part of the work and put the remaining work out to bid. The alarm system work was completed on or about September 8, 2004.

16. L.W. Bills did not submit a bid and did not do the work.

Law

17. As the Georgetown Fire Department chief, Roeder was a municipal employee as defined by G.L. c. 268A, § 1(g).

18. Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from knowingly or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

19. Roeder acted officially as fire chief by discussing the alarm project at a meeting of the Board of Fire Engineers and saying to the Board members that L.W. Bills is on a state bid list and therefore we don't have to put the work out to bid, or words to that effect.

20. At the time he made his statement, Roeder was the president and owner of the entity doing business under the name of L.W. Bills, which had previously done emergency and repair work for the Fire Department for over 25 years. L.W. Bills had also previously performed work for another town agency pursuant to one of L.W. Bills' statewide contracts. By saying that L.W. Bills is on a state bid list and therefore we don't have to put the work out to bid, or words to that

effect, Roeder acted in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Roeder could be influenced as fire chief by L.W. Bills' possible interest in the Mass Highway contract. In other words, a reasonable person would conclude that Roeder's comments were intended to facilitate having the contract go to L.W. Bills. Apparently as a result of Roeder's statement, the Fire Department took no steps to arrange for the performance of the work until Chief Durkee realized that there was no contract with a vendor to perform the work.

21. According to Roeder, his comments were not intended to indicate to the Board of Fire Engineers that L.W. Bills would be selected to perform the alarm project work. Rather, he was attempting to explain the option provided in state contracts to select a pre-approved contractor instead of putting a contract out to bid. Roeder acknowledges, however, that such a comment could have been reasonably perceived as giving the appearance that L.W. Bills could unduly enjoy his favor in the performance of his Fire Department duties.

22. Thus, Roeder knew or had reason to know that he was acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that L.W. Bills could improperly influence or unduly enjoy his favor in the performance of his official duties or that Roeder was likely to act or fail to act as fire chief regarding the award of the fire alarm project as a result of his position with L.W. Bills.

23. Therefore, by acting as described above, Roeder violated § 23(b)(3).

Resolution

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

(1) that Roeder pay to the Commission the sum of $1,500 as a civil penalty for violating G.L. c. 268A as noted above; and

(2) that Roeder waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: March 5, 2008

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0011

IN THE MATTER OF
LAWRENCE P. DRISCOLL

DISPOSITION AGREEMENT

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

On October 11, 2006, and March 14, 2007, respectively, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), two separate preliminary inquiries into possible violations of the conflict of interest law, G.L. c. 268A, by Driscoll. The Commission concluded the inquiries, and on April 25, 2007, and on May 9, 2007, found reasonable cause to believe that Driscoll violated G.L. c. 268A.

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

MacDonald Receives MRB Headquarters Renovation Contract

Findings of Fact

1. Driscoll was a member of the five-person Middlesex Retirement Board ("MRB") from 1983 until 2006. The MRB is the governing body for the Middlesex Retirement System ("MRS").

2. In 2002, the MRS sought to renovate its headquarters at 25 Linnell Circle in Billerica. At an October 3, 2002 meeting, Driscoll and two other MRB members voted 3-2 to reject a $660,000 renovation bid from an internationally known builder. The MRB then created a three-person building subcommittee, which included Driscoll and the two other MRB members who had voted against the bid. The MRB delegated the handling of the headquarters renovation contract to the subcommittee. At this meeting, the MRB's general counsel advised the subcommittee to get three quotes before hiring a general contractor.

3. John C. MacDonald is a builder who was a friend of Driscoll's and another building subcommittee member.

4. On October 5, 2002 (a Saturday), the MRB building subcommittee met. MacDonald was present and verbally submitted a bid of $557,000 to do the renovation. MacDonald also verbally submitted a bid of $595,000 on behalf of another builder. Driscoll knew that MacDonald had solicited and received the bid from the second builder prior to calculating his own bid. General counsel's advice to get three bids notwithstanding, the subcommittee awarded the renovation contract to MacDonald at this same meeting.[1]

5. After MacDonald was awarded the contract, he was informed by the building subcommittee that it needed the headquarters renovation bids in writing. The building subcommittee instructed MacDonald to prepare two written bids: one from MacDonald for $557,000, and the other for $595,000 on behalf of the second builder. MacDonald submitted the written bids to the MRB.

6. MacDonald completed the headquarters renovation on time and on budget.

Conclusions of Law

7. As an MRB member, Driscoll was a state employee as that term is defined in G.L. c. 268A, § 1(q), and therefore subject to the conflict-of-interest law.

Section 23(b) (2)

8. 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.

9. The award of the MRS renovation contract was a privilege.

10. Where the contract award was given to MacDonald through a process which gave the false impression of a competitive bid process, the renovation contract award was an unwarranted privilege.

11. Where the contract was for $557,000, the contract award was an unwarranted privilege of substantial value.

12. By voting to give MacDonald the renovation contract under such circumstances, Driscoll knew that he was using his MRB member position to provide MacDonald with an unwarranted privilege.

13. The unwarranted privilege was not otherwise properly available to similarly situated individuals.

14. Therefore, by voting to give MacDonald the $557,000 renovation contract involving a process which gave the false impression of a competitive bid process, Driscoll knowingly used his official position to secure for MacDonald an unwarranted privilege of substantial value that was not properly available to similarly situated individuals, violating § 23(b) (2).

Section 23(b)(3)

15. Section 23(b)(3) prohibits a state employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This subsection further provides that the appearance of impropriety can be avoided if an elected public employee publicly discloses all of the relevant circumstances which would otherwise create the appearance of conflict of interest.

16. Driscoll acted as an MRB member by voting to award the $557,000 headquarters renovation contract to MacDonald.

17. When he so acted in this matter, Driscoll and MacDonald had a friendship that was not disclosed. Consequently, by acting as an MRB member on a matter in which a friend had a substantial financial interest, Driscoll knew that he was acting in a manner which would cause a reasonable person, knowing all of the relevant facts, to conclude that the MacDonald can improperly influence or unduly enjoy Driscoll's favor in the performance of Driscoll's official duties as an MRB member relating to the headquarters renovation contract. Thus, Driscoll violated § 23(b) (3).

18. Driscoll did not make any public disclosure of the relevant facts to dispel this appearance of impropriety.

MacDonald Hired as Facilities Manager

Findings of Fact

19. After the Linnell headquarters project was completed, the building subcommittee unanimously voted on December 6, 2002 to hire MacDonald as a full-time manager of the MRS headquarters facility, earning over $60,000 annually.

20. Driscoll did not file any disclosures concerning his friendship with MacDonald.

21. MacDonald resigned from the facility manager position in November 2006.

Conclusions of Law

Section 23(b)(3)

22. Driscoll acted as an MRB member by voting to hire MacDonald as the facilities manager with an annual salary of $60,000.

23. When he so acted in this matter, Driscoll and MacDonald had a friendship that was not disclosed. Consequently, by acting as an MRB member on a matter in which a friend had a substantial financial interest, Driscoll knew that he was acting in a manner which would cause a reasonable person, knowing all of the relevant facts, to conclude that the MacDonald could improperly influence or unduly enjoy Driscoll's favor in the performance of Driscoll's official duties as an MRB member relating to the facilities manager position. Thus, Driscoll violated § 23(b) (3).

24. Driscoll did not make any public disclosure of the relevant facts to dispel this appearance of impropriety.

Unwarranted Reimbursements

Findings of Fact

25. Between 2002 and 2004, Driscoll requested travel expense reimbursements from the MRS of approximately $5,120. These expenditures were expenses for conferences he did not attend, non-MRS related airfare, car payments for personal use, and personal items.

26. In November 2005, at the request of the MRB, Driscoll returned to the MRS the sum of $2,437 in transportation and meal reimbursements.

Conclusions of Law

Section 23(b) (2)

27. As an MRB member, Driscoll had authorization to seek reimbursement for legitimate MRB expenses.

28. The receipt of reimbursements was a privilege.

29. Where the reimbursements were not based on legitimate MRB business expenditures, they were unwarranted.

30. Where the expenditures exceeded $50 (individually or in the aggregate), they were of substantial value.

31. By submitting for reimbursement expenditures that were not based on legitimate MRB business expenditures, Driscoll knowingly used his official position to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals. By doing so, Driscoll violated G.L. c. 268A, § 23(b)(2).

Resolution

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

(1) that Driscoll pay to the Commission the sum of $10,000 as a civil penalty for violating G.L. c. 268A, §§ 23(b)(2) and (b)(3) as noted above;

(2) that Driscoll pay to the Commission the sum of $2,683 as a civil forfeiture of the unwarranted reimbursements he received; and

(3) that Driscoll waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: April 29, 2008

[1] The building subcommittee regarded the $660,000 bid previously rejected by the MRB as a third bid.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0001

IN THE MATTER OF
RICHARD BONAVITA

ORDER

On March 28, 2008, pursuant to 930 CMR 1.01(6)(d),[1] the parties filed a Joint Motion to Dismiss (Joint Motion) requesting that the Commission dismiss these adjudicatory proceedings based on statute of limitations grounds. The Presiding Officer, Matthew N. Kane, referred the Joint Motion to the full Commission for deliberations on April 17, 2008.[2]

The adjudicatory proceeding commenced on January 13, 2008 with the issuance of an Order to Show Cause against Respondent Richard Bonavita alleging that he violated G.L. c. 268A, § 23(b)(2) and § 23(b)(3). In his Answer, filed on February 11, 2008, Respondent denied the allegations and asserted the statute of limitations as an affirmative defense.

Pursuant to 930 CMR 1.02(10), "[a]n order to show cause must be issued within three years after a disinterested person learned of the violation." In the Joint Motion, the parties advise the Commission that Petitioner first received a complaint relating to Respondent's alleged violations on January 18, 2005, more than three years before the Order to Show Cause was issued. Accordingly, the Order to Show Cause was not timely issued.

WHEREFORE, the Commission hereby ALLOWS the Joint Motion. Commission Adjudicatory Docket No. 08-0001, *In the Matter of Richard Bonavita,* is dismissed.

DATE: May 16, 2008

[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 Veator did not participate in the deliberations and, therefore, has not signed this Order.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 07-0036

IN THE MATTER OF
JULIE C. MOLLOY

ORDER

On March 25, 2008, pursuant to 930 CMR 1.01(6)(d),[1] the parties filed a Joint Motion to Accept Settlement and Dismiss (Joint Motion) requesting that the Commission approve a Disposition Agreement in settlement of this matter and dismiss these adjudicatory proceedings. The Presiding Officer, David L. Veator, referred the Joint Motion, with the

Disposition Agreement, to the full Commission for deliberations on April 17, 2008.[2]

In the Disposition Agreement, Respondent admits that she violated G.L. c. 268A, § 17(a) and § 17(c) and agrees to pay a civil penalty of SI ,300 and the additional sum of $ 1,700 representing compensation she earned in violation of § 17. Respondent further agrees to waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the Disposition Agreement in this and any other related administrative or judicial proceedings to which the Commission iii or may be a party. Respondent has tendered the payment of the $3,000 civil penalty and forfeiture.

In support of the Joint Motion, the parties assert that the interests of justice, the parties and the Commission will be served by the Disposition Agreement. 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 Joint Motion. The Disposition Agreement is approved. Respondent's tendered payment of the $3,000 civil penalty and forfeiture is accepted. Commission Adjudicatory Docket No. 07-0036, *In the Matter of Julie C. Molloy*, is dismissed.

[1] That regulation provides in relevant part that a motion to dismiss s 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 Veator 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. 07-0036

IN THE MATTER OF
JULIE C. MOLLOY

DISPOSITION AGREEMENT

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

On May 9, 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 Molloy. The Commission has concluded its inquiry and, on July 25, 2007, found reasonable cause to believe that Molloy violated G.L. c. 268A.

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

Findings of Fact

1. At all times relevant, Molloy was an elected member of the Town of Sandwich Planning Board. Planning Board positions had been designated special municipal employee positions for conflict of interest law purposes. At all times relevant, Molloy was an attorney with a private law practice.

2. The Sandwich Zoning Board of Appeals ("ZBA") is the approval authority for special permit applications involving the installation of wind turbines in the Town of Sandwich. Prior to the ZBA's vote on such permits, the Planning Board and other agencies review the applications and provide non-binding comments to the ZBA.

3. In early 2006, the ZBA received a special permit application for the installation of two wind turbines in a densely-settled residential area. At the time, William and Angela LeBeau owned property abutting the site of the proposed wind turbine project.

4. Before June 6, 2006, the LeBeaus met with Molloy and asked her if she could represent them in their efforts to oppose the wind turbine special permit application. After reviewing G.L. c. 268A, Molloy believed that her status as a special municipal employee would allow her to represent the LeBeaus in connection with the application without violating G.L. c. 268A.

5. On June 6, 2006, the Planning Board discussed the special permit application for the wind turbine project. The LeBeaus attended the meeting. Molloy spoke in opposition to the project by raising concerns regarding the turbines' location and compliance with applicable setback requirements.

6. Molloy did not represent the LeBeaus at the time of the June 6, 2006 Planning Board meeting. Rather, her comments in opposition to the special permit application were made in her capacity as a Planning Board member. On June 7, 2006, the Planning Board chair forwarded the Planning Board members' comments, including Molloy's, to the ZBA.

7. On June 13, 2006, the LeBeaus retained Molloy to act as their attorney in opposing the turbine project. On this date, Molloy received a $2,500 retainer check from the LeBeaus.

8. Also on June 13, 2006, the ZBA held a public hearing regarding the wind turbine special permit application. Minutes of the ZBA indicate that Molloy represented the LeBeaus at the hearing and spoke against the proposal.

9. The ZBA approved the special permit application. On June 27, 2006, Molloy filed an appeal of the decision with the Barnstable Superior Court on behalf of the LeBeaus.

10. Following Molloy's filing of the appeal, the LeBeaus requested a refund of the balance of their retainer. Molloy refunded $800 to the LeBeaus and, thereafter, took steps to conclude her representation.

Conclusions of Law

11. As a member of the Sandwich Planning Board, Molloy was at all times relevant a special municipal employee as defined by G.L. c. 268A § 1.

Section 17(a)

12. Section 17(a) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from receiving or requesting compensation from anyone other than the town or municipal agency in relation to any particular matter in which the same town is a party or has a direct and substantial interest. Section 17 applies less restrictively to special municipal employees. A special municipal employee is subject to § 17(a) only relative to a particular matter, (a) in which she has participated, (b) which is or within one year has been a subject of her official responsibility, or (c) which is pending before her own agency.

13. The wind turbine special permit application was a particular matter. The town had a direct and substantial interest in this particular matter.

14. Molloy participated as a Planning Board member in the particular matter by contributing comments for the ZBA's consideration of the special permit application. The particular matter was also subject to her official responsibility as a Planning Board member.

15. Molloy received $1,700 as compensation from the LeBeaus for the above-described legal services performed in relation to the particular matter.

16. Molloy's receipt of compensation from the LeBeaus was not provided by law for the proper discharge of her official duties as a Planning Board member.

17. Therefore, Molloy violated § 17(a).

Section 17(c)

18. Section 17(c) of G.L. c. 268A prohibits a municipal employee, otherwise than in the proper discharge of official duties, from acting as 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. As stated above, § 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 she has participated, (b) which is or within one year has been a subject of her official responsibility, or (c) which is pending before her own agency.

19. As stated above, the wind turbine special permit application was a particular matter

in which the town had a direct and substantial interest.

20. Also as stated above, Molloy participated as a Planning Board member in the particular matter by contributing comments for the ZBA's consideration of the special permit application. The particular matter was also subject to her official responsibility as a Planning Board member.

21. Molloy acted as the LeBeau's attorney in connection with this particular matter by appearing before the ZBA during its consideration of the special permit application and filing an appeal of the ZBA's decision in Barnstable Superior Court.

22. Molloy's actions as attorney for the LeBeaus were not taken in the proper discharge of her official duties as a Planning Board member.

23. Therefore, Molloy violated § 17(c).

Resolution

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

(1) that Molloy pay to the Commission $1,700.00 as a civil forfeiture of the money she received for legal services in violation of G.L. c. 268A, § 17;

(2) that Molloy pay to the Commission $1,300.00 as a civil penalty for violating G. L. c. 268A § 17; and

(3) that Molloy waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: May 20, 2008

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0012

IN THE MATTER OF
JOSEPH DALY

DISPOSITION AGREEMENT

The State Ethics Commission and Joseph Daly 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, s. 4(j).

On July 25, 2006, the Commission initiated, pursuant to G.L. c. 268B, s. 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Joseph W. Daly. The Commission concluded its inquiry and, on October 17, 2007, found reasonable cause to believe that Daly violated G.L. c. 268A.

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

Findings of Fact

1. From December 2002 to September 2004, Daly was the Randolph Housing Authority ("the RHA") executive director.

2. The RHA owns approximately 256 housing units in Randolph. It rents these units for less than fair market value to individuals who qualify on the basis of income.[1] The subsidy provided to each tenant is greater than $50 per month.

Arthur and Mary Hilliard's Sale of 223 Oak Street and Placement in an RHA Unit

3. On September 30, 2003, Arthur and Mary Hilliard applied for a handicapped accessible RHA housing unit. At the time there was a long waiting list for such units. As a general rule, units were made available based on one's place on the waiting list. There were exceptions,[2] but the Hilliards'

circumstances did not warrant immediate placement in an RHA unit.

4. Daly reviewed the Hilliards' application and as RHA executive director met with Arthur Hilliard ("Arthur"). Arthur told Daly the Hilliards' home was owned by a trust. Daly advised Arthur that if the trust evicted the Hilliards, they could qualify for emergency placement in an RHA housing unit on the basis of imminent homelessness.

5. At the time, the Hilliards' home at 223 Oak Street ("the Property") in Randolph was owned by the Hilliard Nominee Trust ("the Trust"), of which the Hilliards were the sole trustees and beneficiaries.

6. On or about December 3, 2003, the Hilliards' daughter signed a Notice to Quit, initiating eviction proceedings on behalf of the Trust seeking possession of the Property. On December 30, 2003, the Hilliards executed an agreement for judgment with the Trust, agreeing to vacate the Property within 60 days. Daly signed the eviction papers as constable and served them on the Hilliards. On January 6, 2004, the Quincy District Court entered a judgment awarding possession of the Property to the Trust. On January 29, 2004, the court issued an Execution Writ for possession of the Property against the Hilliards.

7. On or about January 30, 2004, Arthur provided a copy of the Execution Writ to Daly. Daly as RHA executive director filed the copy with the Hilliards' application for an RHA housing unit at the RHA and selected the Hilliards for immediate placement in a vacant handicapped accessible housing unit, based on emergency circumstances due to imminent homelessness.

8. Also on or about January 30, 2004, Daly notified the Hilliards of their RHA placement and offered them a handicapped accessible RHA unit.

9. On or about February 4, 2004, Daly negotiated with the Hilliards a Purchase and Sale agreement to purchase the Property from the Trust for $200,000.

10. Daly, however, did not purchase the Property. Instead, he discussed the purchase with his father, Edward Daly, who advised Daly that he could not purchase the Property based on conflict of interest concerns.

11. Thereafter, Daly informed the Hilliards that he would be unable to purchase the Property.

12. Arthur then contacted Edward Daly and offered to sell the Property to him. Edward Daly agreed to purchase the Property for $200,000.

13. On February 21, 2004, Daly as RHA executive director and the Hilliards executed a lease agreement for the Hilliards' occupancy of an RHA housing unit. The finalization of the RHA lease allowed the Hilliards to proceed with the sale of their home ("the Property").

14. March 19, 2004, Edward Daly purchased and took possession of the Property. The purchase price was $200,000.

15. The same day, the Hilliards moved into a handicapped accessible RHA housing unit.

16. After performing renovations to the Property, Edward Daly sold the Property on December 13, 2004 for $395,000.

17. Daly did not disclose his private dealings with the Hilliards to his RHA appointing authority, the RHA board of directors.

18. Daly's father, Edward Daly, owns and rents approximately 90 private residential property units in Randolph. Edward Daly receives regular income from the tenants of these properties.

19. In November of 2003, Randolph resident Judith Shultz submitted an application for an RHA housing unit. At the time of her application, Shultz resided at 9 Allen Court in Randolph. She was a tenant of Edward Daly, but because of financial difficulties was not making monthly rent payments to him.

20. Shultz received preference points for placement in an RHA unit, based on her status as a former spouse of a veteran. Daly reviewed Shultz's application and notified her

that she would be placed immediately in an RHA housing unit.

21. Shultz moved into an RHA housing unit in January of 2004. After Shultz vacated the unit at 9 Allen Court, Edward Daly was able to and did rent the unit to other tenants and collected rental payments from these tenants.

Conclusions of Law

22. As RHA executive director, Daly was a municipal employee as defined by G.L. c. 268A, s. 1(g).

23. Daly's father Edward Daly is Daly's immediate family member as defined by G.L. c. 268A, s. 1(f).

Daly's Placement of the Hilliards in an RHA Unit

Section 19

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

25. The RHA's decision to place Arthur and Mary Hilliard in RHA housing and the RHA lease agreement with the Hilliards for the occupancy of an RHA unit were particular matters.

26. Daly had a financial interest in these particular matters because the Hilliards' pending occupancy of an RHA housing unit allowed them to agree to sell Daly the Property.

27. Daly's father, Edward Daly, also had a financial interest in these particular matters because the Hilliards' occupancy of an RHA housing unit allowed them to ultimately sell the Property to him.

28. Daly participated as the RHA executive director in these particular matters by deciding to place the Hillards in an RHA unit and by signing the Hilliards' RHA lease on February 21, 2004.

29. When Daly signed and finalized the Hillard RHA lease, he knew that he and/or his father Edward Daly had financial interests in the finalization of the lease as placement in the RHA unit allowed the Hilliards to proceed with the sale of their home.

30. Accordingly, Daly violated § 19 by participating as the RHA executive director in particular matters in which, to his knowledge, he and/or a member of his immediate family had financial interests.

Section 23

31. 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.

32. The Hilliards' emergency placement in an RHA housing unit was a privilege. This privilege was unwarranted because the Hilliards did not meet the criteria for emergency placement at the time of either their application or selection for placement in an RHA unit. While homelessness due to displacement is a valid basis for emergency tenant selection pursuant to 760 CFR 5.09, this qualification is limited to certain reasons for displacement. Eviction absent certain conditions is not included as a qualifying reason for displacement. Moreover, Daly knew or had reason to know the eviction relied on to justify the Hilliards' placement was a contrivance. Thus, Daly knew or had reason to know that the Hilliards were not eligible for emergency placement.

33. Daly used his official RHA position to secure this privilege for the Hilliards by, as RHA executive director, advising the Hilliards how they could qualify for emergency placement by creating an imminent homelessness condition, filing the Execution Writ issued by the Quincy District Court with the Hilliards' application for RHA housing, selecting the Hilliards for emergency placement in an RHA handicapped accessible unit, and signing the lease between the RHA and the Hilliards for an RHA housing unit.

34. The unwarranted privilege of emergency placement was of substantial value, based on the fair market value of the RHA housing unit subsidy provided to the Hilliards.

35. Because the Hilliards' emergency placement was contrary to applicable regulations, the privilege was not properly available to other RHA housing unit applicants.

36. Therefore, Daly violated § 23(b)(2) by, as described above, knowingly or with reason to know, using his official position to secure for the Hilliards an unwarranted privilege of substantial value not properly available to similarly situated individuals.

Daly's Agreement to Purchase 223 Oak Street

Section 23

37. Daly's opportunity to purchase the Property was also a privilege. This privilege was unwarranted because, at the time Daly negotiated with them a purchase and sale agreement regarding the property, the Hilliards were subject to Daly's official authority or regulatory jurisdiction.

38. A public employee negotiating terms of a private transaction with persons under his official authority may provide the employee with unwarranted privileges by virtue of the employee's power over the person under his jurisdiction. In short, such negotiations may be inherently coercive and exploitive. It is difficult or impossible for the person subject to the public employee's jurisdiction to refuse the terms negotiated by the public employee. Thus, by negotiating the terms of a private transaction with a person under his official power, the employee may use his official position to obtain an unwarranted privilege.

39. A public employee's private business relationship with a person within his regulatory jurisdiction violates § 23 unless (1) the relationship is entirely voluntary; (2) it was initiated by the person under the supervisory employee's jurisdiction; and (3) the supervisory employee's public written disclosure under § 23(b)(3) states facts clearly showing elements (1) and (2). Thus, failure to meet elements (1) or (2) will violate § 23(b)(2); failure to make the disclosure required by (3) will violate § 23(b)(3).[3]

40. By negotiating with the Hilliards to buy the Property and later offering to substitute his father in the transaction to purchase the Property from the Hilliards while the Hilliards' application for placement in a subsidized RHA housing unit was pending before him as RHA executive director and they were under his official authority, Daly used or attempted to use his official position to secure an unwarranted privilege for himself and/or his father. Daly did not publicly disclose to his appointing authority his private dealings with the Hilliards.

41. This privilege was of substantial value, as evidenced by the profit realized by Edward Daly on the sale of the property.

42. Because Daly's opportunity to purchase the Property arose in the context of a regulatory relationship between Daly and the Hilliards, the privilege was not properly available to similarly situated persons.

43. Therefore, Daly violated § 23(b)(2), by as described above, knowingly or with reason to know, using or attempting to use his official position to secure for himself an unwarranted privilege of substantial value not properly available to similarly situated individuals.

Daly's Selection of Judith Shultz for Placement in an RHA Housing Unit

Section 19

44. The RHA's decision to place Judith Shultz in an RHA unit was a particular matter.

45. Daly's father, Edward Daly, had a financial interest in this particular matter because at the time of her application for RHA housing, Shultz was his tenant and was having difficulty making her rent payments. Shultz's placement in an RHA unit allowed Edward Daly to rent her unit to other tenants and to collect rent payments from them.

46. Daly participated as the RHA executive director in this particular matter by:

a. selecting Shultz for placement in an RHA housing unit; and

b. finalizing Shultz's placement in January of 2004.

47. When Daly so participated, he knew that Shultz was his father's tenant and that she was having difficulty making rent payments to him. Therefore, Daly knew that his father had financial interests in the particular matter.

48. Accordingly, Daly violated § 19 by participating as the RHA executive director in a particular matter in which, to his knowledge, an immediate family member had financial interests.

Resolution

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

(1) that Daly pay to the Commission the sum of $5,000 as a civil penalty for repeatedly violating G.L. c. 268A, sections 19 & 23; and

(2) that Daly waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: June 23, 2008

---

[1] The RHA was established pursuant to the provisions of G.L. c. 121B. Eligibility for RHA tenancy is regulated by 760 CMR 1.00 et seq.

[2] 760 CMR 5.09 establishes criteria for priority placement and certain preference categories.

[3] *See* EC-COI-92-7. *See also In the Matter of Scott Trant* (2006) (The Commission fined a police officer $10,600 for attempting to purchase property from a person seeking police assistance in connection with the property).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 08-0013

IN THE MATTER OF
P.A. LANDERS, INC.

DISPOSITION AGREEMENT

The State Ethics Commission and P.A. Landers, Inc. ("P.A. Landers") 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 P.A. Landers. The Commission concluded its inquiry and, on October 17, 2007, found reasonable cause to believe that P.A. Landers violated G.L. c. 268A.

The Commission and P.A. Landers 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 ("Mass Highway") construction inspector assigned to inspect P.A. Landers' work on Route 44 near Plymouth.

2. Kennedy's duties included processing in a timely fashion official project paperwork necessary for P.A. Landers to receive payment for its work on the project.

3. Terry Edwards was P.A. Landers' project manager during a portion of the Route 44 project.

4. On or about March 2002, Kennedy approached Edwards on the Route 44 project and requested reimbursement for gas expenses the inspector incurred through use of his personal vehicle at work. Upon Kennedy's request, Edwards acquiesced. Edwards was concerned that Kennedy would impede the timely processing of project paperwork if he refused Kennedy's request, and believed that things would "go a little smoother" if he made the payments. Thereafter, Kennedy provided Edwards with gas receipts and received cash

reimbursements from Edwards on a bi-weekly basis. Edwards' payments to Kennedy began in May 2002, and continued until November 2002. Each of the payments was greater than $50 and averaged $200. During this time, Kennedy received a total of between $2,000 and $3,000 in cash payments.

5. Edwards made these payments to Kennedy with P.A. Landers funds. Edwards received these funds from the company by submitting Kennedy's receipts, along with his own, to the company for reimbursement from the company's petty cash fund. Edwards' reimbursement requests to P.A. Landers did not identify Kennedy as the recipient of the funds and were made contrary to company policies regarding the distribution of funds.

6. Edwards acquiesced to Kennedy's request for payment and gave Kennedy these payments with the intent to influence Kennedy's timely processing of official project paperwork necessary for P.A. Landers to receive payment for its work on the project and to make things "go a little smoother."

Conclusions of Law

Section 3(a)

7. Section 3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving anything of substantial value to any state employee for or because of any official act performed or to be performed by such an employee.

8. Through its employee Edwards, P.A. Landers gave Kennedy between $2,000 and $3,000 in cash payments between March 2002 and November 2002.

9. These payments were not as provided by law for the proper discharge of official duty.

10. Each of the cash payments was of substantial value.

11. Through its employee, Edwards, P.A. Landers gave these payments to Kennedy to induce him to not delay and to reward him for not delaying the processing of official project paperwork necessary for P.A. Landers to receive payment for its work on the project, and to induce Kennedy to make or to reward him for making things "go a little smoother."

12. Kennedy's timely processing of official project paperwork, or his making things "go a little smoother," involved official acts performed or to be performed by Kennedy.

13. Therefore, P.A. Landers violated § 3(a), by, as described above, otherwise than as provided by law for the proper discharge of official duty, giving cash payments of substantial value to a state employee for or because of official acts performed or to be performed by such an employee.

14. According to P.A. Landers, Edwards' payments to Kennedy were contrary to company policy and were accomplished only by Edwards circumventing established safeguards regarding the distribution of funds. P.A. Landers acknowledges, however, that as a business organization, P.A. Landers acts through and is responsible for the conduct of its employees. This is so even if the conduct is unauthorized.[1]

Resolution

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

(1) that P.A. Landers pay to the Commission the sum of $10,000 as a civil penalty for repeatedly violating G.L. c. 268A § 3; and

(2) that P.A. Landers waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: June 25, 2008

[1]See _In re John Hancock Mutual Life Insurance Cp._, 1994 SEC 646.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

IN THE MATTER OF
JAMES M. RUBERTO

PUBLIC ENFORCEMENT LETTER

Dear Mayor Ruberto:

As you know, the State Ethics Commission conducted a preliminary inquiry into whether you, as the Mayor of the City of Pittsfield, had violated § 23 of the conflict of interest law, G.L. c. 268A, by your actions in connection with holding a press conference at Pittsfield City Hall on October 31, 2006, and by your actions in connection with a political rally at Pittsfield High School on November 1, 2006. Based on the staff's inquiry (discussed below), the Commission voted on January 16, 2008, to find that there is reasonable cause to believe that you violated § 23.

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. The October 31, 2006 Press Conference at Pittsfield City Hall

A. Facts

On October 31, 2006, you held a press conference at Pittsfield City Hall at which you endorsed state senate candidate Ben Downing. In preparation for the conference, you asked your aide to find a mutually acceptable date for you and Mr. Downing to hold the conference, and then make the necessary press arrangements. The aide sent out a brief press advisory, which he stated took only a couple of minutes to produce and fax, to 16 to 20 media outlets. The aide greeted media members as they came to the conference. The aide then stood and listened as you conducted the press conference at which you endorsed Mr. Downing. The conference lasted between 15 and 25 minutes.

B. Discussion

Section 23(b)(2) prohibits a public official from knowingly or with reason to know using or attempting to use his official position to secure for himself or others an unwarranted privilege of substantial value, which is not properly available to similarly situated individuals.

The Commission has consistently held that the use of public resources of substantial value ($50 or more) for the purpose of supporting a political campaign amounts to the use of one's official position to secure an unwarranted privilege. These public resources include stationery with the letterhead of a public office, office supplies, utilities, telephones, office equipment, office space or other facilities, or a public employee's time on the public payroll. See *Commission Advisory No. 84-01, "Political Activity."* Indeed, the Commission revised this advisory in April, 2006, to make clear that public resources should not be used in connection with press conferences where the primary purpose of the conference was campaign-related. The revised advisory states: "In addition, public resources may not be utilized to: … set up or hold a press conference or press availability the predominant purpose of which is to endorse, promote or oppose a federal, state, county or municipal candidate."

By, in your capacity as Mayor, directing your aide to set up the press conference at which you endorsed Mr. Downing, by using City Hall resources to hold the conference and city office equipment to send out the press notice, you used your official position to secure city resources for a private political purpose. Therefore, there is reasonable cause to believe that you violated § 23(b)(2).[1]

II. The November 1, 2006, Political Rally at Pittsfield High School

A. Facts

The evidence indicates that roughly ten days before the November 1, 2006 Deval Patrick event at the Pittsfield High School (the "Event"), someone from the Patrick campaign called you in your capacity as mayor and proposed that Mr. Patrick appear at the high school and conduct a town hall-type question and answer event with the students. You then checked with the school's superintendent to get her reaction to the proposal. She consulted with school counsel, who took the position that such an event would be permissible provided that equal access was allowed to any other candidate. On October 26, 2006, the superintendent e-mailed you giving her approval.

You instructed your aide to work with the high school principal and the Patrick campaign staff to deal with the logistics of the event. You invited a number of "VIPs" to the event. In fact, according to an October 30, 2006, e-mail from the principal, it was his understanding that you had "invited approximately 50 VIPs including many local politicians." The e-mail also states, "Several dignitaries have been invited to speak as an introduction to Deval, among them the mayor, John Olver, Ben Downing …." We asked you if you were aware that any dignitaries were going to speak in addition to Mr. Patrick. You replied, "I don't recall." You acknowledged that you knew in advance that you would be giving some sort of welcome speech as mayor.

The Event began around noon on November 1st. There were approximately 150 students in the audience. The school band was there. The event was also open to the public. Some people in the audience held campaign signs.

The school principal began the event with some neutral introductory remarks. He did not give a campaign speech. He then introduced you as Mayor. You gave a partisan political campaign speech. You emphasized the importance of the Democrats taking back the State House. You endorsed state senate candidate Ben Downing. You also emphasized the importance of re-electing Congressman Olver.

Congressman Olver spoke for a few minutes, also giving a campaign speech. He then introduced state senate candidate Downing. Mr. Downing gave a campaign speech. Mr. Downing then introduced Mr. Patrick, who gave a campaign speech. The entire event lasted approximately 30 minutes. The students were never given the opportunity to ask Mr. Patrick questions.

<u>Public Resources</u>

The following is a breakdown of the public resources involved in the Event:

- Two Building Department employees spent three to four hours each repairing the school's front steps to alleviate a potential tripping hazard.
- Several Parks Department employees spent "a day and half or so" tidying up the school and raking the grounds. You had specifically instructed the Parks Department to ready the grounds of Pittsfield High School for the Event.
- Daytime patrol officers working their normal shifts were assigned by the police department to be at the high school during the event. Three officers plus the police department's school resource officer were at the high school during the event.
- Payroll records indicated that six Pittsfield High School custodians were assigned four hours of overtime apiece on Saturday, October 28, 2006, to work in the high school in preparation for Mr. Patrick's visit. The total overtime paid to the six custodians was $571.68. The custodians worked to clean and prepare the area of the school where Mr. Patrick would go during his visit. Much of the custodians' work involved scrubbing, waxing and buffing the floors.
- Approximately 150 students plus the school band attended the event.
- School teachers and administrators planned for and attended the event during school hours.

The Patrick campaign was not billed for any costs incurred by the City relative to the

Event. Ordinarily, a private group using the high school would be required to pay a fee.

Because you had a concern that there might be an appearance that you were using public resources to support a campaign event, you instructed your aide who was working on the Event to take a vacation day for the day of the Event, November 1st.

B. Discussion

As already discussed above, § 23(b)(2) prohibits public officials from using public resources for political campaign purposes. Based on the evidence outlined above, there is reasonable cause to believe that your conduct with respect to the Event violated § 23(b)(2) in two respects: First, in your allowing public resources to be used in connection with what was essentially a partisan political rally; and second, in your endorsing at this event various candidates running for public office.

By way of defense, you argue that the Event was intended to be and in fact was essentially an educational opportunity for the students. Although it may be that the original intent was to have a town hall session between the students and gubernatorial candidate Patrick, it is clear, based on the October 30, 2006 e-mail cited above, that by the time the e-mail was sent the event had significantly changed. By that point you had invited numerous "VIPs," some of whom were Democratic candidates. And it appears that you knew or should have known before the Event that these candidates would be likely to, and in fact did, give campaign speeches. Indeed, you obviously knew that you intended to give a standard political speech at this Event in which you would endorse Mr. Patrick and other candidates.

It may well be that the students received a positive educational experience from the Event. But that end does not justify the means used here. An argument could be made that it would be of educational value to allow students to use school time and resources to campaign for a candidate. In that regard, they could set up and use telephone banks to call voters, or use art supplies to create brochures, do mailings, and so forth. Nevertheless, such use of public resources to promote a candidacy would be inappropriate, however educational.

In stating generally that public resources may not be used for campaign purposes, the Commission is not saying that a public building may never be used for such purposes. Public buildings are often made available to private groups, usually for a fee. If a political group were to use a school or any other public building pursuant to an existing policy, that would be a warranted privilege under § 23(b)(2) assuming the policy was applied in an even-handed manner. Moreover, if the Event had stayed true to its original intent, i.e., a simple question and answer session between candidate and students, the Event would have been primarily educational, an excellent civics lesson for the students involved. Such an event would not raise G.L. c. 268A issues.

In contrast, however, the Event was predominantly campaign-oriented, replete with candidate signs and endorsement speeches, and devoid of any questions from the students to Mr. Patrick.

Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission, however, chose to resolve this case with an education letter rather than by imposing a fine because it believes the public interest would best be served by doing so.

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, and, therefore, this matter is now closed.

Very truly yours,

Karen L. Nober
Executive Director

DATE: June 30, 2008

---

[1] In a February 13, 2007 letter, the Office of Campaign and Political Finance informed you, "The time spent by your aide to arrange for the conference, as well as the use of the city fax and phone for purposes of promoting the endorsement, and the use of your office for the endorsement, did not comply with the campaign finance law."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 07-0017

IN THE MATTER OF LINCOLN SMITH

DECISION AND ORDER

Appearances: Karen Beth Gray, Esq.
Council for Petitioner

Michael J. Trait, Esq.
Counsel for Respondent

Commissioners: Daher, Ch., Kane, Kempthorne, and Veator.[1]

Presiding Officer: Commissioner Matthew N. Kane

I. Background & Procedural History

On May 23, 2007, Petitioner initiated these proceedings by issuing an Order to Show Cause ("OTSC") under the Commission's Rules of Practice and Procedure.[2] The OTSC alleged that Respondent Lincoln Smith ("Smith"), while the Boston City Council's Assistant Research Director, violated G.L. c. 268A, section 23(b)(2)[3] when he, knowingly or with reason to know, directly or indirectly invoked his City Council position and the powers associated with the City Council during a discussion with valet parking employees concerning a claim for damage done to his car at Brigham and Women's Hospital ("Hospital"), in order to secure for himself an unwarranted privilege of substantial value that was not properly available to similarly situated individuals.

Smith filed an Answer on June 13, 2007. In his Answer, Smith admitted a number of the factual allegations in the OTSC, but otherwise denied that he violated section 23(b)(2).

Subsequent to a pre-hearing conference on June 29, 2007, Smith filed a Motion for Decision on the Pleadings. After hearing oral argument on July 30, 2007, the Presiding Officer referred the Motion to the Commission for its review.[4] The Commission thereafter denied the Motion.[5]

An evidentiary hearing was held on November 7, 2007 and November 20, 2007.[6] At the hearing, the parties made opening statements and introduced evidence through witnesses and exhibits. At the conclusion of Petitioner's case and then again at the close of all the evidence, Smith moved for a directed verdict. The Presiding Officer denied that Motion each time.[7]

Both parties filed briefs:[8] Petitioner filed on February 4, 2008; and Respondent filed on February 6, 2008. The parties presented closing arguments to the Commission on February 13, 2008.[9]

The Commission began its deliberations in executive session on this matter on February 13, 2008.[10] 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

Smith and the City Council

1. Lincoln Smith ("Smith") is the Boston City Council Assistant Research Director, a position which he has held since 1996. In that position, he is a member of the City Council's central staff reporting directly to Ann Hess Braga ("Hess Braga") on a day-to-day basis and to the City Council overall.

2. Pursuant to his official job description, Smith is responsible for the following: (a) researching issues of interest to Councilors, including gathering information from other municipalities; (b) drafting legislation and reports resulting from research undertaken for Councilors or Council committees; (c) assisting the Research Director in coordinating all research projects undertaken at the request of Councilors or Council committees; (d) recruiting and training research interns from local colleges and universities; (e) providing staff support for assigned committees, scheduling committee hearings, attending hearings and preparing notes and committee reports, drafting or revising legislation at the request of committee members; and (f) performing other duties as assigned by the Council or Staff Director.

3. In his position, Smith also has involvement with constituents and interactions with City Councilors. Hess Braga testified, for example, that Assistant Research Directors provide the additional resource for professional support for the City Councilors in research and issue tracking. She further stated that they may work with particular Councilors on a close basis on areas of their interest and will alert the City Councilor to issues they may be unaware of which they might want to review or have a hearing on. According to Paul Walkowski,[11] the responsibilities of a central staff member, such as an Assistant Research Director, with respect to issues that come before the City Council are "not de minimis."

4. In November 2005, Smith was the back-up to the liaison[12] to the Committee on Planning and Economic Development ("Planning Committee")[13] which had oversight over hospital growth and expansion.[14] Among other responsibilities, the Planning Committee "shall exercise exclusive oversight with respect to all ... medical ... and large scale residential development and building within the city until said project has been awarded a certificate of occupancy."[15]

5. The liaison acts in an administrative capacity to make sure that the hearings are scheduled, people are notified and notices are sent. When serving as a liaison, an Assistant Research Director is responsible for putting together a list of attendees for the Committee Chair or the sponsor to review, drafting letters, hearing notices, researching the topic at issue and writing questions. They would also "staff" the hearing itself and follow-up with Committee reports.

6. In November 2005, Smith was working only part-time after having returned from a long recovery after a serious accident.

Hospital Parking and Development Issues

7. Brigham and Women's Hospital ("Hospital") is located at 75 Francis Street in Boston. The Hospital works with the City on a myriad of issues, including institutional master planning, zoning, permitting and licensing. Issues with respect to the development of the Hospital would be under the purview of the Planning Committee which in November 2005, was chaired by Councilor James Kelly. If a plan came in that affected some other City Councilor's district, Councilor Kelly's normal procedure would be to "shelve it" and refer it to the district's City Councilor. The Hospital was not in Councilor Kelly's district.

8. An institutional master plan for the Hospital was submitted to the City Council in 2004. The institutional master plan was part of a series of documents that the developer and architect submitted to the City Council as well as other agencies outlining their plans for building, traffic and environmental issues. The Planning Committee did not take any action on the Hospital's plan in 2004 or 2005.

9. There are numerous parking issues at the Hospital because it is a very large hospital in a very small area with local residents right next door. Among other things, there are not enough parking spaces in the area for the Hospital employees as a result of the construction of a new building across the street from the main Hospital building. The neighborhood is concerned with cars parking in the streets, traffic in the streets, traffic violations, noise and construction.

10. Smith was personally aware of parking issues in the area because among other things, his primary care physician is at the Hospital, his mother is a Hospital patient and his close friend with whom he lunches monthly, lives right across the street. He also knew from standing on the tarmac at the Hospital that there was major construction going on and it was a congested area with traffic back-ups.

VPNE and its Contract with the Hospital

11. VPNE Parking Solutions ("VPNE") is a parking transportation company that provides parking management and valet parking. It has a $4 million contract with the Hospital to provide parking garage management and valet parking. VPNE has 130 of its employees working at the Hospital, some 35 to 40 as valets.

12. David Nolan ("Nolan") has worked for VPNE for approximately eleven years. In November 2005, he was the Hospital's Account Manager and Vice-President. As Account Manager, he oversaw operations, staffing, hiring, claims and customer service as well as general operations, administration and

oversight. Nolan has handled hundreds of damage claims as part of his duties and responsibilities at VPNE.

13. In November 2005, Christopher Sargent ("Sargent") was VPNE's Staffing Manager at the Hospital. As Staffing Manager, he was responsible for hiring and training employees, taking care of the payroll, the billing hours and general managerial duties overseeing the personnel, including the valets, attendants and the cashiers. On November 17, 2005, VPNE did not have an official claims manager for the Hospital.

14. To use the valet service at the Hospital, customers drive into the valet lane at the Hospital's main entrance. The valet, manager or attendant gives them a valet ticket and then the person proceeds into the Hospital. VPNE then takes the car down to a garage and parks it. The valet marks the ticket with the make, model, color, location and license plate and whether there is any damage to the car. VPNE trains its employees to walk around the car looking for damage and then record any damage on the ticket. When the person is leaving, the car is then returned to them. VPNE handles valet parking for over 500 cars a day at the Hospital's main entrance.

15. There is a mitigation agreement between Partners Healthcare and Roxbury Tenants of Harvard Neighborhood ("Mitigation Agreement").

16. In the Mitigation Agreement, the Hospital agreed to hold VPNE, as its contractor, to the standards of speeding, driving, littering and noise in the neighborhood. As Staffing Manager, it was Sargent's responsibility to make sure that the people who worked for VPNE followed the Mitigation Agreement "to a T." A sheet is handed out to every new employee of VPNE and they are trained to follow all of the eight points therein.[16] They also sign to indicate that they have seen and know the Mitigation Agreement. As part of his job, Sargent prepared monthly reports for the Hospital outlining each of the eight points, noting any issues that might be in conflict and how VPNE had rectified them.

17. Sargent and Nolan believed that VPNE's contract with the Hospital was dependent on its compliance with the Mitigation Agreement, as well as customer service and claims management.

VPNE's Claims Procedure

18. From time to time, vehicles may be damaged at the Hospital garage. The standard operating procedure to deal with claims of damage is to meet with the person making the claim and fill out a report. VPNE checks all the damage on the vehicle and meets with any of the supervisors who might be aware of what might have happened. They investigate the accident and come to a decision as to whether they accept or deny the claim. They may also involve security from the Hospital.

19. If it is something that they saw happen or know happened, VPNE has company loaner cars that it gives to a person while their car is being repaired. VPNE has an agreement with a body shop for repairs. It can hire a third party appraiser to look at the car. The individual can also bring it to his own body shop and can bring in his insurance company.

20. The standard operating procedure would be the same if VPNE did not believe that the damage was caused while the car was in its possession. VPNE would tell the person that they would follow-up, look into it and then get in touch with them to tell them what their ultimate decision was. If VPNE declines responsibility, they would recommend that the individual speak with their insurance company.

21. If Nolan believed that VPNE caused the damage, he had the responsibility and the authority to resolve and accept liability at that time, right there on the scene. He had 100% discretion either way. Nolan could resolve complaints on his own if he was certain that VPNE was responsible. They could pay a claim without oversight. VPNE, however, does not let its employees deny a claim without looking at it and making sure that's what it wants to do.

22. The factors involved in deciding whether to settle or pay a damage claim include looking at the damage itself and why or why not VPNE thinks it may have happened. VPNE does an analysis on a scale of 1 to 10 whether they think it happened or not and whether it might be in the best interest of the Hospital to pay something.

23. VPNE has paid many times on a claim when Nolan did not believe that VPNE was liable because the accounts, the clients and the contracts are much more important than a single claim here or there.

Smith's Visit to the Hospital on November 17, 2005

24. Smith purchased his car, a blue 2003 Nissan Maxima, in mid-July 2005. His car was garaged in Weymouth at the home of his mother, June P. Murphy ("Murphy").

25. On November 17, 2005, Smith went to his mother's house, picked up his car there and drove his mother to the Hospital for a test. When they arrived at the Hospital, there were a number of valets standing there. Smith and Murphy got out of the car and they gave Smith a ticket and took the car. After his mother's appointment concluded, Smith went down to the Hospital lobby, paid the valet bill and he and his mother sat down in the lobby window and waited for them to retrieve the car. When they saw the car come up the driveway being driven by a valet, they walked out of the Hospital.

26. When the valet returned his car, Smith pointed out that there was a long scratch from the front side door to the back door on the passenger side. Smith asserted that the damage happened at the Hospital garage. When the valet stated that the damage did not happen at the garage, Smith asked to see a supervisor.

27. Around 1:00 p.m., Sargent received a telephone call from the 75 Francis Street supervisor saying that there was a customer with a damage claim and could he come down and take the paperwork. When Sargent was heading down, he ran into Nolan who decided to go down with him. Before speaking to Smith, Sargent did not talk to any of the VPNE employees involved in transporting the car and he had not looked at the intake ticket.[17]

28. Sargent and Nolan went down to the Hospital's main entrance where they introduced themselves to a gentleman who introduced himself as "Lincoln Smith." Smith shook both of their hands. They had never met Smith before.

29. They asked Smith what the situation was. Smith showed Sargent and Nolan a long scratch on the passenger side of his car that went back through his rear window molding. Smith told them it had happened since he parked in the lot at the Hospital.

30. Sargent and Nolan looked at the scratch and noticed that where it went through the rear molding, there appeared to be rust. They told Smith that there appeared to be rust in the scratch. They also told him repeatedly to call his insurance company.

31. Smith became very angry at the suggestion that the scratch was pre-existing. He asked Sargent how he could accuse him of lying. Sargent had not accused Smith of lying, but he did not want to accept or deny responsibility at that moment without further information. Both Nolan and Sargent stated that they were not going to take any action that day and that Smith should contact his insurance company, have an appraiser look at the car and then send them the information to review.

32. In view of the dispute, Smith said that he would like to have a police officer on the scene to do a report. Nolan loaned Smith his cell phone which he used to contact the Boston Police Department. During the call, Smith referenced a particular officer by name.

33. After he hung up the phone, Smith told both Nolan and Sargent that he was "on the City Council," that he was "cognizant" of the parking issues in the area and of the Hospital's growth and construction in the area and its "goal to expand in the area." He also told them that he knew that the Hospital needed "a lot of permits for it and [he] kn[ew] that a lot of that goes through the City."[18]

34. A Boston Police Officer subsequently came out and filled out a report. A report was also filled out by a security officer at the Hospital. Nolan left the area when the Boston Police Officer came. He then returned to the scene with another VPNE employee, Hal Waterman ("Waterman"). Although Nolan did not want to get anyone else involved in the matter, he asked Waterman to join him because "this has been a little interesting and I want someone to kind of be there, just kind of hear this."

35. After the Boston Police Officer took the report, Smith asked Nolan who owned VPNE. He responded that the owner was Kevin Leary. They had some conversation about whether Smith knew Leary and whether Leary was from Dedham. Smith told Nolan that "well, maybe I don't know [Leary], but I will .... [Y]our permits have to come through my desk in my office. I will see his name again." When Nolan asked Smith, "Is that a threat?" Smith responded, "no, I'm just saying that I will see his name again, any permits from your company, your parking company, have to come through my office. I will see his name."[19]

36. These statements by Smith that he was on the City Council, cognizant of parking issues and aware of permitting issues, caused both Nolan and Sargent to believe that Smith was a City Councilor and to be concerned about what he could do to VPNE and its business with the Hospital. The fact that Smith said he was on the City Council affected Nolan's behavior, causing him to "wal[k] on eggshells" and a "red flag" to go up. His statements made a difference to Nolan "because [they] have a contract with the [H]ospital" and his "number one concern" was that underlying contract.[20]

37. Nolan believed that Smith wanted it taken care of that day, that he did not want to leave until it was taken care of, and that he did not want to call his insurance company.

38. Sargent filled out VPNE's standard claim report. He took down the license plate, the model and make of the car. He used information that he received from Smith to fill out the report. He asked Smith for an address and a telephone number. Smith provided him with his home telephone number, his address and post office box. The VPNE claim form had two telephone numbers written on it. The number written at the bottom is Smith's private inside line at Boston City Hall.

39. Smith never claimed that he would take any specific action with respect to permits for the Hospital and similar things through the City Council.

40. Nolan believed that Smith was trying to get VPNE to accept liability for the scratch on his car based on his City Council position and by threatening him with what could happen if they did not assume such liability.

41. Nolan did not change his position about what he was going to do in response to Smith's comments.

42. Both Nolan and Sargent provided Smith with copies of their business cards on November 17, 2005. Smith did not provide a copy of his business card to either Nolan or Sargent.[21]

43. The Hospital has video cameras that would show any car that came up and was dropped off for valet service at some point. Smith asked to see the videotapes. Sargent told him "[n]o, that's not our policy."

44. The valet ticket that was on Smith's car, in the area where it says "damage," says "no" written on it.[22]

45. After leaving Smith, Nolan went back into his office in the Hospital and "googled" Smith and the Boston City Council. He got to the City Council page which listed Smith's name, but his name was not listed as a Councilman. At some point, they heard that Smith was not on the City Council, but rather an employee of the City Council.

46. That same day, Nolan also wrote an e-mail to Leary who was the COO of VPNE and Leary's son, explaining what had happened. In his e-mail recounting the interaction with Smith he stated: "After [Smith] got off the phone he told me that he was on the Boston City Council and that he was 'cognizant of the parking issues' in the area and of the [Hospital's] 'goal to expand in the area.'" Nolan wrote that Smith said "he would eventually [know Leary] because VPNE would have to go through his office to get any permits for valet parking." Nolan further wrote that he asked Smith if that was a threat to which he responded "no."[23]

47. Sargent and Waterman also prepared e-mails to Leary that day. Sargent went back to his office and wrote down the whole incident, typed it out and e-mailed it to Nolan that afternoon and the next day to Leary. In his e-mail, Sargent stated that Smith "made a point of informing us that he is on the Boston City Council." He went on to state: "[I]n what I feel was a veiled threat to hinder the services of VPNE and the [Hospital], Mr. Smith also stated that he was aware of the neighborhood parking

issues and the construction activity that face the [Hospital].”

48. The e-mails written by Nolan, Sargent and Waterman were forwarded to Hess Braga by Leary. Leary also called Michael Flaherty, the City Council President.

Settlement of Smith’s Damage Claim

49. The next day, Smith brought his car to a licensed appraiser at the dealership where he had purchased it. The damage was estimated at approximately $2,800.

50. Smith received a call at home from Nick Constanza (“Constanza”), a VPNE Claims Manager, who asked him to fax the appraisal to him along with the police incident report which he did. VPNE received an estimate done at a body shop for the damage to Smith’s car. Costanza told Smith that VPNE was not going to be sending him the $2,800 he requested.

51. Leary, VPNE’s President, contacted Smith at his home and left a voice mail message. In that message, Leary told Smith that they had four pictures, two of which as they discussed, appeared to him to have rust on the chrome molding and he saw nothing else that was conclusive either way. Leary also stated that he did take Smith’s advice and “followed up with all of [his] team about how to respond to these situations.” In particular, he noted that they were “retraining everyone ... in the company, to make sure that when something is brought to their attention, as we discussed, ... it will be received well, and that people will be made comfortable with bringing it in, and the front people are not defensive.”

52. Smith contacted his insurance agent who filed a claim through Arbella Mutual Insurance (“Arbella”) for the damage to his car. VPNE was subsequently informed that it was going to be brought to court.[24]

53. After a settlement offer from counsel for Arbella, the claim was settled on the day of trial for $1,000. Nolan decided to accept the offer of 50% as “good business” because anything could happen at a court hearing.

III. DECISION

Section (23)(b)(2) of G.L. c. 268A is violated if a municipal employee “knowingly, or with reason to know . . . use[s] or attempt[s] 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 adjudicatory proceedings before the Commission, the burden of proof is on Petitioner, which must prove its case by a preponderance of the evidence.[25] The weight to be attached to any evidence rests in the sound discretion of the Commission.[26]

Thus, in order to establish a violation of G.L. c. 268A, section 23(b)(2), Petitioner must prove by a preponderance of the evidence that: (1) Smith was a municipal employee; (2) who attempted[27] to use his official position; (3) to secure an unwarranted privilege or exemption[28] for himself or others; (4) which was of substantial value; (5) which was not properly available to similarly situated individuals; and (6) that Smith did so, knowingly or with reason to know. The following is a discussion of each of these elements.

A. Municipal Employee

The OTSC alleges that as the Boston City Council Assistant Research Director, Smith was a municipal employee within the meaning of G.L. c. 268A. Smith admits that he holds that position and that, as such, he is a municipal employee[29] within the meaning of the conflict of interest law.

B. Attempted to Use His Official Position

The OTSC alleges that Smith attempted to use his official position by directly or indirectly invoking his City Council position and the powers associated with the City Council during his discussions with VPNE regarding the damage to his car. Smith denies that he attempted to use any position and states that he had no power or authority over the Hospital and/or VPNE. The issue therefore, is whether Petitioner has proven by a preponderance of the evidence that Smith attempted to use his official position.

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, section 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). The interpretation of the use of official position element of a section 23(b)(2) violation must also take into account that the purpose of the conflict of interest law "was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing." *Selectmen of Avon v. Linder,* 352 Mass. 581, 583 (1967). Accordingly, the Commission has interpreted the statute "as a prophylactic measure." *Scaccia v. State Ethics Commission,* 431 Mass. 351, 359 (2000).

Applying these legal principles to this case, we find that Petitioner has proven by a preponderance of the evidence that Smith attempted to use his official position based on the testimony, which we credit, of the two VPNE employees, David Nolan and Christopher Sargent.[30]

Nolan and Sargent's testimony makes clear that Smith invoked his employment relationship with the City Council.[31] They testified that Smith made the following statements: (1) he was "on the Boston City Council"; (2) he was "cognizant" of the parking issues in the Hospital area and the growth plans, construction plans of the Hospital and the "goal to expand in the area"; (3) the Hospital would need "a lot of permits for it and [he] know[s] that a lot of that goes through the City"; and (4) that "your permits have to come through my desk in my office."

Nolan also testified that there was a second discussion about permits. He testified that when he and Smith were discussing Kevin Leary, the owner of VPNE, Smith said: "[W]ell, maybe I don't know him, but I will. . . . [Y]our permits have to come through my desk in my office. I will see his name again." When Nolan asked Smith "is that a threat?" Smith responded "[N]o, I'm just saying that I will see his name again, any permits from your company, your parking company, have to come through my office. I will see his name."[32]

By making these statements, we find that Smith intended to convey the message that he had some power to influence the public business as it related to VPNE. In particular, he sought to make clear that he had some official role concerning City permitting as it related to the Hospital and VPNE.

The message was effective; Smith's statements caused Nolan and Sargent to believe that he was a City Councilor and to be concerned about what he could do to VPNE and its business with the Hospital. Sargent testified credibly that he was concerned by Smith's statements because "I don't know a whole lot about the Boston City Council. But I do know this, ... it sounds to me like the Boston City Council could have some effect on the business. It sounds to me like a Boston City Councilman could directly affect our business, if they were unhappy with something." Nolan similarly testified credibly that the fact that Smith said he was on the City Council affected his behavior, causing him to "wal[k] on eggshells" and a "red flag" to go up. Smith's statements made a difference to Nolan "because [they] have a contract with the [H]ospital" and Nolan's "number one concern" was that underlying $4 million contract.

Even though Smith was not actually a City Councilor, we find that in these circumstances, Smith's invocation of his employment relationship with the City Council by virtue of his position as its Assistant Research Director and member of its central staff, was a use of his official position. Smith's official job description[33] demonstrates that his position had significant contact with, and responsibilities for, City Council work. For example, according to his official job description, as Assistant Research Director, he was responsible for among other things, researching issues of interest at the request of any City Councilor, drafting legislation and reports for them and providing staff support for assigned committees. In addition, his supervisor, Hess Braga, testified that Assistant Research Directors provide additional support for City Councilors in research and tracking issues and that they are involved with constituents and interactions with any City Councilor who may request and use their services as needed.

This conclusion is further supported by the timing of the comments made by Smith. Nolan and Sargent testified that, upon first meeting Smith, he introduced himself as only "Lincoln Smith." It was only after they had told him that they thought there was rust in the scratch, that they were not going to be accepting or denying liability that day and that they wanted him to contact an appraiser and his insurance company before they would make a decision, that Smith interjected his official position into the unrelated discussion concerning the damage to his car. It was at that time that he told them that he was on the City Council, that he was cognizant of the parking issues in the area and he knew about the Hospital's need for permits.

That Smith may have overstated his actual authority, implying that he had more power than he in fact had does not sway the analysis. His statements to the VPNE employees invoked and drew upon his influence and power which he had by virtue of his employment with the City Council and was therefore, a use of his official position. Moreover, as his official job description demonstrates, Smith did, in fact, have responsibility for the work of the City Council and access to City Councilors in a way that was significantly different than another person such as a constituent of a City Councilor.[34] In this way, Smith's use of his official position was different from that situation, for example, when an individual asserts that they are a City Councilor when, in fact, they have no actual employment association or connection with that body.

To determine otherwise would place an inappropriate burden of inquiry on someone hearing such statements to undertake an independent analysis into the actual power of the person making such statements. In any event, this element of a section 23(b)(2) violation is satisfied if the municipal employee attempts to use his official position, even if he does not actually do so.

C. To Secure an Unwarranted Privilege For Himself or Others

Petitioner argues that the unwarranted privilege that Smith was seeking was to have VPNE assume liability at the scene for the damage to his car at a time when it was not sure that it had caused the damage as a result of its concern regarding the statements that he made. In contrast, Smith argues that he did not expect the matter to be resolved on that day, he did not ask or expect anything from VPNE and that he only wanted a report to file with his insurance company to protect himself because of the dispute as to the cause of the damage. He further argues that asking VPNE to take responsibility for the damage that it caused was not in any way "unwarranted." The issue therefore, is whether Petitioner has proven by a preponderance of the evidence that Smith was seeking to secure an unwarranted privilege 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.* Previous Disposition Agreements approved by the Commission have found that the use of an official position to promote a personal or family interest is unwarranted for purposes of section 23(b)(2). See, e.g., *In Re Foley,* 2001 SEC 1008, 1010 (outreach worker for Council on Aging's implied endorsement of her son and daughter-in-law to an individual she was assisting in selling her home was "unwarranted because [she] should not hav[e] been using her official position to promote her own family's interests"); *In Re Haluch,* 2004 SEC 1165, 1166 ("public employees may not threaten to use their official position or powers to obtain an advantage for themselves in a private dispute").

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*.). See *Craven v. State Ethics Commission,* 390 Mass. 191, 202 (1983) (Supreme Judicial Court upheld Commission's determination that an award of government benefits based on applying pressure on state employees to abandon normal agency procedures to evaluate applicants and to award benefits because of concern for agency's budget violated section 23(d), the predecessor to section 23(b)(2)).

Applying these legal principles to this case, we find that Petitioner has proven by a preponderance of the evidence that Smith attempted to seek an unwarranted privilege for himself based on the testimony, which we credit, of Nolan and Sargent for the following reasons.

When Smith pointed out the damage to his car to Nolan and Sargent, they both told him that it looked like there was rust in the scratch which would mean that it had been there for a period of time. Nolan had discretion at the scene to accept a claim if he knew or saw what had happened. Both VPNE employees testified that in all other situations, pursuant to their standard operating procedure, they would take a report, review the information and then make a decision. They told Smith repeatedly that they would not resolve the claim on November 17th because they wanted the rust looked at and that Smith should have an appraiser look at his car and that he should get in touch with his insurance company. Neither one of them made a determination that day whether or not VPNE should accept responsibility for the damage.

Nolan testified that he believed Smith wanted it taken care of that day, that he did not want to leave until it was taken care of and that he did not want to call his insurance company. He took Smith's statements to mean that Smith wanted VPNE to take care of it right then. Although Smith never expressly said that he was threatening Nolan or that he would take any specific action with respect to the Hospital, Nolan inferred and believed from Smith's statements that Smith wanted VPNE to accept responsibility because of his position and what could happen. Nolan never changed his position in response to Smith's comments.

This testimony supports the conclusion that Smith was seeking the unwarranted privilege of bypassing VPNE's standard operating procedure for claims and having VPNE accept responsibility based not on the facts, but rather out of its concern that Smith could, in his official capacity, somehow hurt either the Hospital or VPNE. Nolan had the discretion to accept responsibility at the scene if VPNE saw or knew what happened. There was no testimony that either Nolan or Sargent actually witnessed Smith's car being damaged or that they had any knowledge as to how it had been damaged.[35] Their testimony is that they were called to the scene at Smith's request. At that time, Smith pointed out the damage to them. Based upon their inspection, they believed that they saw rust in a portion of the scratch, which would indicate that it was pre-existing damage and therefore, not the responsibility of VPNE. In keeping with their standard procedure, they asked him to contact his insurance company, have an appraiser look at the car and then send them the information to review.

We find Smith's argument that he could not have been seeking an unwarranted privilege because VPNE was, in fact, responsible for the damage to his car unpersuasive. We do not need to decide the issue as to the cause of the damage to resolve the question of whether he violated section 23(b)(2). Even if VPNE was responsible, Smith's attempt to get VPNE to accept responsibility based - - not on their firsthand knowledge of how the damage was caused or after an investigation of all the facts - - but rather based on a fear of what Smith could do to the Hospital, the company and/or the company's $4 million contract, was an attempt to gain an unwarranted privilege. In essence, Smith was seeking a special benefit or privilege to circumvent an investigation of the damage and VPNE's standard operating procedures in order to obtain an immediate settlement.

D. Which is of Substantial Value

The OTSC alleges that an insurance adjuster subsequently estimated the damage to Smith's car at $2,800 which Smith admits.[36] VPNE paid $1,000 to settle the damage claim. Smith further admits that his insurance company paid him his $500 deductible.[37] 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). Based on Smith's admissions and the undisputed testimony, we find by a preponderance of the evidence that the unwarranted privilege was of substantial value.[38]

E. Not Properly Available to Similarly Situated Individuals

Petitioner argues that the unwarranted privilege of substantial value was not available to similarly situated individuals because other people who believed that their car was damaged by VPNE would not be able to use their position and association with the Boston City Council to seek a more favorable outcome in a private damage dispute.[39] Smith argues that he was not seeking anything that another person in his situation would not have been entitled to seek - - asking VPNE to accept responsibility for its actions. The issue, therefore, is whether Petitioner has proven by a preponderance of the evidence that the privilege of substantial value was not properly available to similarly situated individuals. We find that Petitioner has met this burden. We find that similarly situated individuals would be those individuals who also believed that their cars had been damaged while in the care of VPNE. Those individuals would not be able to interject their official position or an official position that could affect VPNE's $4 million contract with the Hospital in an effort to obtain a favorable outcome in a private dispute. A similarly situated person would not have been able to obtain an immediate settlement either. They would have had to follow VPNE's standard claims procedure.

F. Knowingly or With Reason to Know

Petitioner argues that Smith knowingly or with reason to know used his official position to secure for himself an unwarranted privilege of substantial value that was not properly available to similarly situated individuals. Smith argues that any such knowledge element would need to be rational, and that to infer or ascribe such intent or knowledge to him in this situation would be unreasonable because he had no power or ability to take any action to affect VPNE and/or the Hospital. The issue therefore, is whether Petitioner has proven by a preponderance of the evidence that Smith's actions were done knowingly or with reason to know.

"Knowingly" and "reason to know" are not defined in the conflict of interest law. "Knowingly" 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).

In contrast, "reason to know" 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).

In the event that a public employee denies that he intended to use his position to secure an unwarranted privilege of substantial value not properly available to similarly situated individuals, the public employee's conduct will be judged by what the employee knew or had reason to know at the time of his conduct. *In Re Singleton*, 1990 SEC 476.

In *In Re Singleton,* the Town's Fire Chief maintained that he did not intend for his remarks to be perceived as an attempt to use his official position to secure private business for himself or his son. As noted in the Disposition Agreement, "Singleton had reason to know his remarks would be perceived as an attempt to use his official position to secure the drywall contract since he knew that his son had submitted a bid to retain the drywall contract and that Gibraltar would require additional inspections from the Fire Department as construction progressed." *Id.* at 478 n.5 (section 23(b)(2) "embodies objective test" to judge what public employee knew or had reason to know at time of his conduct).

In a similar manner in another Disposition Agreement, Hayes, a Selectman, asserted that the remarks he made to Town police officers after they stopped him for speeding, including identifying himself as a Selectman and asking them to call the Chief, were made out of frustration and that he did not intentionally attempt to use his Selectman position to avoid being issued a ticket. *In Re Hayes,* 1999 SEC 951. Under the objective standard, however, even if Hayes did not know that his conduct would be perceived as an attempt to secure an unwarranted privilege of substantial value, he had reason to know his conduct would be so perceived. *Id.* at 952, n. 4. See *In Re Galewski,* 1991 SEC 504, 505 n. 2 (Assistant Building Inspector, asking developer during course of inspection whether developer could build him a house he could afford, knew or should have known that in effect he was using his position as inspector to attempt to secure unwarranted privileges).

Applying these legal principles to this case, we find that Petitioner has proven by a preponderance of the evidence that Smith's attempt to seek an unwarranted privilege for himself of substantial value that was not properly available to similarly situated individuals was done knowingly or with reason to know for the following reasons.

We credit the testimony of Nolan and Sargent as to what Smith said to them. We further find that such statements were made for the purpose of getting VPNE to accept liability for the damage to his car at the scene. Based on Smith's statements and the timing of those statements, there is sufficient evidence from which it may be inferred that under these circumstances, even if Smith did not subjectively know or have a specific intent to do so, he should have known that making such statements would be perceived by others, including the VPNE employees, as an attempt to use his position to obtain an unwarranted privilege of substantial value that was not properly available to similarly situated individuals. Moreover, because of his position as Assistant Research Director, including his committee liaison duties, Smith knew or had reason to know that that it was likely that any Hospital plans or neighborhood complaints would come before the City Council committees with which he had been involved. Smith was also aware that as part of his job, he could be working closely with any individual City Councilor as requested. The fact that neither Nolan nor Sargent "caved" in to the improper pressure that Smith sought to bear on their private dispute does not change our conclusion.[40] Smith's invocation of his employment relationship with the City Council was an improper attempt to influence the discussion and VPNE's investigation of the accident at issue.

IV. Conclusion

Petitioner has proven by a preponderance of the evidence that Smith violated G.L. c. 268A, section 23(b)(2) when he knowingly or with reason to know used his position as the Assistant Research Director for the Boston City Council to invoke his employment with the City Council and the power of the City Council in a discussion with VPNE concerning a claim for damage done to his car in an effort to get them to accept liability for the damage at a time when liability was uncertain.

V. Order

Having concluded that Respondent Lincoln Smith violated G.L. c. 268A, section 23(b)(2) and pursuant to the authority granted it by G.L. c. 268B, section 4(j), the State Ethics Commission hereby **ORDERS** Lincoln Smith to pay a civil penalty of $1,000.

DATE AUTHORIZED: August 1, 2008
DATE ISSUED: August 18, 2008

---

[1] Because Commissioner King was not appointed to the Commission until April 2008, he has not participated in the deliberations and therefore, has not signed this Decision and Order.

[2] 930 CMR 1.00 *et seq.*

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

[4] 930 CMR 1.01(6)(a)(1).

[5] *See* Order on Respondent's Motion for Decision on the Pleadings dated September 18, 2007.

[6] 930 CMR 1.01(9)(b).

[7] *See* Amended Order on Respondent's Motion for Directed Verdict dated February 4, 2008.

[8] 930 CMR 1.01(9)(k).

[9] 930 CMR 1.01(9)(e)(5).

[10] G.L. c. 268B, s. 4(i); 930 CMR 1.01(9)(m)(1).

[11] Walkowski, who testified that he is close friends with Smith, is a member of the Boston City Council's central staff currently serving as a Special Project Assistant to the President of the Rules Committee.

[12] The back-up to the liaison fills in when the liaison is not available.

[13] The Planning Committee's name was changed to the Economic Development and Planning Committee.

[14] Smith is listed as the "Admin. Back Up" to the Planning Committee for 2005, 2006 and 2007 on the Boston City Council Committee assignments. He is listed as liaison for 2002, 2003 and 2004.

[15] In 2002, Smith was assigned as liaison, and in 2003-2004, as the back-up, to the University-Community Relations Committee when it existed. That Committee was responsible for reviewing the interactions between the neighborhoods and large institutional developments in the City, including hospitals. In 2005, he was assigned as liaison to the Institutional Relations Committee which was concerned with "developing an improved relationship between [the City's] neighborhoods and both public and private institutions impacting them."

[16] The eight points are as follows: (1) speeding around the neighborhood is prohibited and will be strictly enforced; (2)

aggressive and reckless driving is also prohibited; (3) all valets will stop at stop signs and intersections; (4) all valets shall give right-of-way to pedestrians crossing the street; (5) no valet shall be caught littering in the Neighborhood; (6) VPNE employees will make a conscious effort to pick up any valet tickets littering the ground if they come across it; (7) all VPNE employees will respect the RTH Neighborhood and will refrain from creating or participating in commotion that results in loud noise levels; and (8) VPNE employees who do not live in the RTH Neighborhood are not allowed to park their vehicles in "Residents permit parking sections" on the street.

[17] Neither Nolan nor Sargent did any investigation regarding the damage prior to speaking to Smith.

[18] We credit Nolan and Sargent's testimony as to what Smith said to them on November 17th. Their testimony is supported by their e-mails prepared that same day for the President of VPNE who subsequently forwarded them to Hess Braga at the Boston City Council.

[19] We credit Nolan's testimony on this issue which is supported by his contemporaneous e-mail prepared that day for Leary.

20 Sargent similarly testified that he was concerned by Smith's statements because "I don't know a whole lot about the Boston City Council. But I do know this, ... it sounds to me like the Boston City Council could have some effect on the business. It sounds to me like a Boston City Councilman could directly affect our business, if they were unhappy with something."

[21] We do not credit Smith's testimony that he provided Nolan and/or Sargent with a copy of his Assistant Research Director business card. He admitted that he did not tell the Commission's investigator that he had given his business card to Nolan or Sargent and that he did not include any such statement in either his submission to the Commission or to the City Council.

[22] Nolan testified that the valet ticket did not change his mind whether the damage was caused by VPNE. As he stated: "[F]rom that entrance alone, we do 500 cars a day. Priority one is moving the cars ... so that the next line of patients can come in. ... It's get the patients in the [H]ospital, not get the cars surveyed 100 percent. And we're not perfect at it – at getting the damage down. It's not priority one. I wish we were. But, we're not. So ... it's a piece of the puzzle in any damage claim."

[23] Nolan testified that he prepared his e-mail because he "needed to let my company know and the [H]ospital know that someone who was from the Boston City Council, said that they know all about the parking permits in the area, and he's going to see my company name come across his desk."

[24] The original claim for $1,468.58 was superseded by a claim for $2,000.

[25] 930 CMR 1.01(9)(m)(2).

[26] 930 CMR 1.01(9)(l)(3).

[27] Because there has been no evidence that Smith actually received any unwarranted privilege, this case involves only Smith's alleged attempt to use his City Council position to secure an unwarranted privilege. *See In Re Clancy*, 2000 SEC 983, 986 n.7 (PEL) ("s. 23(b)(2) applies to attempts to use one's official position to secure an unwarranted privilege as well as to actual use").

[28] The OTSC (¶15) alleges, and Petitioner argues, only that Smith sought an unwarranted privilege, not an unwarranted exemption. Accordingly, we address only the unwarranted privilege issue.

[29] OTSC & Answer, ¶¶3 & 14.

[30] We credit their testimony which is supported by Nolan, Sargent and Waterman's contemporaneous e-mails to their boss, Kevin Leary, the owner of VPNE. Nolan testified that he prepared his e-mail because he "needed to let my company know and the [H]ospital know that someone who was from the Boston City Council, said that they know all about the parking permits in the area, and he's going to see my company name coming across his desk."

[31] We do not credit Smith's testimony that Nolan and Sargent asked him if he was "with the City Council" because it is contradicted by his own testimony. When Smith was first asked by the Hearing Officer how he responded to that question, he said that he did not respond. He repeated that answer when asked again on cross-examination. When asked a third time on re-direct examination, he stated that he responded "yes." Smith testified that he believed that they had asked him the question because he had given them one of his City business cards, although he further testified that he did not include that statement in either his submission to the City Council Rules Committee which was reviewing the matter or the Commission and, in fact, even told the Commission's investigator that he had "no idea" how his City Council staff position came into play. Nolan and Sargent deny receiving a business card from Smith, which testimony we credit. Smith also did not include a statement in his submission to the Commission that either Nolan or Sargent had asked him if he was with the City Council.

[32] This conversation is supported in part as well by Smith's testimony. Although Smith denied that he ever threatened or intended to threaten, Nolan or Sargent, he did admit that when they were discussing parking issues, Nolan asked him, "is that a threat?". Smith further testified that he was aware of parking issues at the Hospital and of the Hospital construction.

[33] His job description was admitted as Exhibit 4 without objection by Smith.

[34] Even Smith's good friend, Paul Walkowski, testified that the role of the central staff members (which includes the Assistant Research Director) with respect to issues that come before the City Council, was "not de minimis."

[35] They both testified that they had done no investigation regarding the damage prior to speaking to Smith.

[36] OTSC & Answer, ¶12.

[37] Answer, ¶12.

[38] Even though the unwarranted privilege that Smith sought to obtain was an immediate settlement of the matter which did not occur, we can reasonably infer that given the estimated cost to repair the damage ($2,800) and the amount sought by Arbella in the litigation ($2,000), an immediate settlement would have had a value greater than $50. In addition, if an immediate settlement had been made, Smith would have saved the costs associated with spending time necessary to proceed through the insurance claim process.

[39] As the Commission noted in *EC-COI-95-5*, the phrase "similarly situated individuals" is not defined in the conflict of interest law.

[40] See *In Re Cibley*, 1989 SEC 422 (s. 23(b)(2) violated by Selectman's unsuccessful attempt to fix a ticket for a friend). See *also In Re Clancy*, 2000 SEC 983, 986 n.6 (ex parte meeting was an unwarranted privilege of substantial value "regardless of its effectiveness").

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0016

IN THE MATTER OF EDWARD DREW

DISPOSITION AGREEMENT

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

On May 9, 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 Drew. The Commission concluded its inquiry and, on November 15, 2007, found reasonable cause to believe that Drew violated G.L. c. 268A.

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

Findings of Fact

1. From 2000 to 2007, Drew was the City of Waltham Police Chief. During his tenure as Police Chief, Drew often sought advice and guidance from the City Law Department and the State Ethics Commission on ethics and conflict of interest issues. He made a determined effort to comply with G.L. c. 268A.

2. In 2002, Drew's daughter, Jennifer Vadnais, was hired by the Waltham Police Department ("Department") as a patrol officer.

3. In the fall of 2005, three background investigator positions became available on the Department. Background investigator positions are temporary assignments for full-time, paid police officers in the Department.

4. Vadnais applied to be a background investigator, but was not selected. Instead, Deputy Chief Paul Juliano approved three other officers for the openings and notified each of their appointment. Drew had no involvement in the selection process until his daughter was not selected.

5. On November 23, 2005, after the officers were notified, Drew called Deputy Chief Juliano on Juliano's department-issued cell phone and discussed the process used to make the background investigator appointments. Drew took issue with the fact that Vadnais and others who were not selected were told that they did not have enough seniority, yet officers who had the same lack of seniority were solicited for the assignments. Drew also took issue with the fact that one of these officers received assurance of an appointment even though the officer had not applied for the assignment. Drew also told Juliano that unlike those who were not selected, some of those solicited or selected for the positions rarely turned in significant reports nor were they involved in noteworthy investigations. Drew also questioned why the Union officers who had applied were not selected and told Juliano that he saw problems with the Union arising over the process. During the approximately 35 minute conversation, Drew did not direct Juliano to take any specific actions with regard to the appointments.

6. At the end of their conversation, Juliano told Drew that he would have one of the appointments withdrawn by eliminating one of the positions.

7. Juliano then caused to be cancelled one of the background investigator appointments. Consequently, only two individuals were appointed as background investigators and one of the appointees who had been notified of her selection was informed that she would not be a background investigator. Vadnais did not get the assignment.

Conclusions of Law

8. As the Waltham Police Chief, Drew was a municipal employee as defined by G.L. c. 268A, § 1(g).

Section 23(b)(2)

9. 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.

10. The appointments to the background investigator positions were privileges.

11. Drew called Deputy Chief Juliano, discussed the qualifications of the candidates for the background investigator position, and questioned the appointments approved by Juliano. Although he did not direct Juliano to take any specific action, Drew's phone call had a significant likelihood of causing Vadnais to be appointed as a background investigator. Therefore, Drew used his position to secure this privilege for Vadnais.

12. This privilege was of substantial value based on the compensation paid to police officers.

13. This privilege was unwarranted because, at the time Drew called Juliano to discuss the background investigator appointments, these appointments had already been made and Vadnais had not been selected. For the same reason, this privilege was not properly available to similarly situated individuals.

14. Therefore, Drew violated § 23(b)(2) as described above by attempting to use his official position as Police Chief to secure for Vadnais an unwarranted privilege of substantial value not properly available to similarly situated individuals.

Resolution

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

(1) that Drew pay to the Commission the sum of $1,000.00 as a civil penalty for violating G.L. c. 268A as noted above; and

(2) that Drew waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: September 8, 2008

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 07-0001

IN THE MATTER OF
MICHAEL O'TOOLE

DECISION AND ORDER

Appearances: Karen Beth Gray, Esq.
Council for Petitioner

Douglas S. Brooks, Esq.
Counsel for Respondent

Commissioners: Daher, Ch., Kempthorne, Veator, and King

Presiding Officer: Commissioner David L. Veator

On October 18, 2007, Respondent Michael J. OToole filed a motion for summary decision to dismiss all claims made by Petitioner, the Enforcement Division of the State Ethics Commission, in an Order to Show Cause ("OSC") issued and filed on January 19, 2007. Specifically, Respondent seeks the dismissal of the following claims:

1) that Respondent, as the Executive Office of Public Safety ("HOPS") Assistant Secretary and Executive Director of the HOPS programs division in 2003 repeatedly violated section 6 of G.L. c. 268A by partic-ipating as executive director of the EOPS programs division in particular matters in which to his knowledge Crest

> Associates ("Crest") had a financial interest while negotiating for and/or having an arrangement concerning prospective employment with Crest, by authorizing certain payment vouchers and approving certain reports, and
>
> 2) that Respondent, as a former state employee, violated G.L. c. 268A, s. 5(a) in or about the summer of 2003 by receiving compensation from Crest regarding writing a quarterly report for a police department in connection with particular matters in which he had participated as the EOPS undersecretary.

Respondent argues that he is entitled to summary decision dismissing all of Petitioner's claims for the following three reasons:

> 1) Petitioner's claims are barred by the statute of limitations;
>
> 2) Respondent's future employer, Crest, did not have a "financial interest" within the meaning of G.L. c. 268A, s. 6(a) in the authorizations and quarterly reports at issue in the OSC; and
>
> 3) Respondent did not "participate" within the meaning of G.L. c. 268A in the payments and approvals at issue in the OSC.

In support of his Motion for Summary Decision, Respondent filed a Memorandum on October 18, 2007, and a Reply Memorandum on December 26, 2007. Petitioner filed an opposition to Respondent's motion and a supporting Memorandum on November 21, 2007. Petitioner opposes all of Respondent's three stated bases for summary decision. The parties have filed affidavits and documents in support of their respective positions.

In deciding Respondent's motion for summary decision prior to any hearing on the evidence, the facts in the record are viewed in the light most favorable to Petitioner. *Ravinkar v. Bogojavlensky*, 438 Mass. 627, 628 (2003). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Riley v. Presnell*, 409 Mass. 239, 244 (1991).

Facts Relating to Respondent's Alleged Violations of G. L. c. 268A

From September 19, 2001 until March 28, 2003, Respondent was the EOPS Assistant Secretary and Executive Director of the EOPS Programs Division. The EOPS Programs Division annually receives millions of dollars for grant programs from the United States Department of Justice. Respondent oversaw grant operations at the EOPS Programs Division.

Crest was, at the time relevant, a Boston-based private firm that assisted cities, towns and regional police organizations in obtaining public safety grants. Crest's principal was Richard St. Louis ("St. Louis"), who was a former EOPS Chief of Staff. During late February and early March, 2003, Respondent negotiated for private employment with Crest. On March 4, 2003, O'Toole accepted a position with Crest and submitted a resignation letter to EOPS, effective March 28, 2003.

After he began employment negotiations with Crest, Respondent, as the EOPS Programs Division Executive Director, signed five vouchers authorizing a total of $1,118,750 in payments to Crest clients (all municipal police departments) and approved thirteen quarterly reports relating to the payments submitted by police departments which were Crest clients. Under EOPS Program Division policy, the payments were contingent on the approval of the reports. All or most of the authorized payments were to reimburse the Crest clients for payments already made to Crest.

After O'Toole left HOPS in late March 2003, he began working for Crest in or about April, 2003. In or around the summer of 2003, Respondent, as a compensated Crest employee, wrote or assisted in writing a quarterly report for a Crest municipal police department client that related to an EOPS grant in which he had participated as the HOPS Programs Division Executive Director.

Facts Relating to Petitioner's and Public Knowledge of Alleged Violations

Petitioner's Affidavits

According to Petitioner's affidavits, the Petitioner did not learn of Respondent's alleged conduct in violation of G. L, c. 268A until, at the earliest, January 26, 2004 (slightly less than three years before the OSC was issued), when a Boston Globe editorial, focused on former EOPS Secretary James P. Jajuga's actions concerning the disbursement of EOPS grants and Crest, led to an Enforcement Division investigator doing an internet search which turned up various news articles relating to an FBI investigation concerning public safety grants. (Affidavit of Commission Special Investigator Scott Cole and first Affidavit of Commission Special Investigator Brian McWilliams, Petitioner's Exhibits A and B.)

The investigators' affidavits leave unclear exactly when and how Respondent became a subject of a Commission investigation which apparently, at least at first, focused on others. Cole states, "I believe the Respondent was added later, probably when the drafted complaint was reviewed by the Enforcement Division Chief." It is also unclear what conduct by Respondent the investigation concerned when it was first opened. Indeed, the investigators' affidavits indicate that the Enforcement Division only learned of Respondent's alleged violations substantially later than January, 2004. Thus, the Cole Affidavit states that the Enforcement Division, "obtained in or about April 2006, evidence indicating that O'Toole may have participated as an EOPS employee in matters in which Crest had a financial interest after he began negotiating for employment with Crest." The first McWilliams Affidavit states that OToole's testimony at an October 25, 2006 deposition was, "the first time that the Enforcement Division became aware that O'Toole had acted as a Crest consultant in a matter directly related to a matter in which he participated as an EOPS employee." A second affidavit by McWilliams (Petitioner's Exhibit D), states the Commission has no record indicating that at any time prior to January 26, 2004, the Commission "was aware of any complaint relating to participation by [Respondent] as executive director for the [EOPS] programs division in matters of financial interest to [Crest] while O'Toole was negotiating for or had an arrangement of [sic] prospective employment with Crest; and/or that O'Toole acted as agent or knowingly received compensation directly or indirectly from [Crest] in connection with a particular matter in which the Commonwealth or EOPS was a party or had a direct and substantial interest, and in which O'Toole participated as a state employee while so employed."

In addition, according to Petitioner's affidavits, the Attorney General and the relevant District Attorneys were also unaware of Petitioner's alleged violations prior to January 26, 2004. (Petitioner's Exhibits E, F, G, H, I, and J).

Respondent's Media Reports

Against Petitioner's affidavits, Respondent has offered copies of more than 20 news stories which appeared in the Boston area news media in late 2003 and early 2004, as proof that Respondent's conduct allegedly in violation of G. L. c. 268A was a matter of "general knowledge in the community" or, at least, discoverable by Petitioner through reasonable inquiry and was, thus, something that Petitioner knew or should have known more than three years before the OSC issued. (Respondent's Exhibits C through U, W through Z, 3 and 4) The news reports, dated between October 30, 2003 and January 20, 2004, generally focus on the state Office of the Chief Medical Examiner ("OCME"), EOPS, public safety grants, including grants to municipal police departments, and Crest.

Although none of the news stories focus primarily on Respondent, eight of them refer to Respondent by name and identify him as a former EOPS employee working for Crest. (Respondent's Exhibits D, E, Q, S, W, X, 3 and 4). Most of these eight reports specifically identify Respondent as a former EOPS Programs Division Executive Director or grants administrator or director or otherwise connect him to the EOPS public safety grants program. An October 30, 2003 Boston Herald article (starting on page 1) stated, "At least two of St. Louis' current associates at Crest are also under federal scrutiny, law enforcement sources said. They are: Michael J. O'Toole, a former chief of staff at public safety... and a former executive director of the Public Safety Office Programs Division..." (Respondent's Exhibit D). An October 31, 2003 Boston Herald article (starting on page 2) stated, "[Crest's] associates include Michael J. O'Toole, also an exchief of staff ..." (Respondent's Exhibit E) A December 6, 2003 Boston Globe article (starting on page Al of the Metro/Region section) reported, "Until March, when O'Toole left his job as grants administrator in the [EOPS] to join Crest, he had worked closely with St. Louis, who was submitting grant applications to the state agency on behalf of his clients, state officials said." (Respondent's Exhibit S) A December 23, 2003 Boston Globe article (starting on page Al of the Metro/Region section) concluded with the statement, "Moreover, Michael O'Toole, the previous public safety director of grants, left office in March and now also works for St. Louis." (Respondent's Exhibit W). A December 27, 2003 Boston Globe article (starting on page Al of the Metro/Region section) about Jajuga reported, "Another former public safety official, Michael O'Toole, a longtime grants director at the [EOPS], left office in March and has since joined Crest Associates. ... Jajuga and O'Toole have helped North Andover secure substantial state and federal grant money. In 2002, for example, North Andover was one of only four police departments statewide to receive extra community policing money. All four were clients of Crest Associates. ... While still a state public safety official, O'Toole exercised his discretion to award extra community policing money to Arlington, which received $40,000 more for a total of $80,000; Concord, an extra $40,000 for a total of $63,750; Melrose, an extra $40,000 for a total of $105,000; and North Andover, an extra $30,000 for a total of $123,000 in fiscal year 2002, according to state records," (Respondent's Exhibit X) A January 19, 2004 Boston Globe article reported, "Two other Jajuga aides, Michael O'Toole and Ann Dawley, recently joined Crest, after serving in high-ranking positions at the public safety office." (Respondent's Exhibit 3) Finally, a January 20, 2004 Boston Herald article reported, "Michael O'Toole, a former top official under Jajuga at the [EOPS] who oversaw the grant program, now works at Crest Associates." (Respondent's Exhibit 4).[1]

Discussion

A. The Statute of Limitations Regulation

Following the case of *Nantucket v. Beinecke*, 379 Mass. 345 (1979),[2] which applied the three-year tort statute of limitations of G.L. c. 260, section 2A and the limitations period-tolling discovery rule to a claim under G.L. c 268A, section 21, the Commission adopted a regulation establishing a three year limitations period and a six year repose period on the Commission's issuance of an order to show cause. The regulation, contained in 930 CMR 1.02(10), states:

(10) Statute of Limitations.

(a) An order to show cause must be issued within three (3) years after a disinterested person learned of the violation.

(b) A respondent must set forth affirmatively a statute of limitations defense.

(c) When a statute of limitations defense has been asserted, the petitioner will have the burden of showing that a disinterested person learned of the violation no more than three (3) years before the order was issued. That burden will be satisfied by:

1. an affidavit from the investigator currently responsible for the case that the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before the order was issued, and

2. with respect to any violation of M.G.L. c. 268A other than section 23, affidavits from the Department of the Attorney General and the appropriate Office of the District Attorney that, respectively, each office has reviewed its files and no complaint relating to the violation was received more than three (3) years before the order was issued, or

3. with respect to any violation of M.G.L. c. 268A, section 23, an affidavit from the respondent's public agency that the agency has reviewed its files and the agency was not aware of any complaint relating to the violation more than three (3) years before the order was issued.

(d) If the petitioner meets the burden under 930 CMR 1.02(10)(c), 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 section 23 violation only, the respondent's public agency.

(e) The running of the three (3) year limitations period set out in 930 CMR

1.02(10)(a), will be tolled during any court ordered stay of the Commission's inquiry or during the pendency of any court proceeding in which the petitioner seeks to enforce a summons pursuant to M.G.L. c. 268B, section 4(c).

(f) In no event should an order to show cause be issued more than six (6) years after the violation.

Thus, rather than applying a fixed three-year limitation period from the date of the alleged conduct in violation of the conflict of interest law, the Commission's statute of limitations regulation incorporates a version of the tort discovery rule, which tolls the running of the limitation period until "a disinterested person learn[s] of the violation." (A "disinterested person" being a person not involved in the commission of the alleged violation.). Under the Commission's regulation, this knowledge of the violation by the disinterested person may be actual or constructive. More specifically, the regulation establishes "general knowledge in the community" as the point at which a disinterested person, including the Commission, will have constructive knowledge of the violations (or, in other words, the point at which the Commission should have known of the violation). The Commission's use of a three-year tort limitations period and the discovery rule has been upheld in *Zora v. State Ethics Commission* and *LIAM v. State Ethics Commission*.[3] These court decisions and the Commission's own decisions have indicated that the statute of limitations begins to run when a disinterested person capable of acting on behalf of the Commission to enforce the conflict of interest law knew or should have known of the wrong.[4]

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

Petitioner has sought to meet its burden under 930 CMR 1.02 (10)(c) (1) and (2) by providing affidavits by an investigator from the Enforcement Division of the State Ethics Commission, an Assistant Attorney General and several Assistant District Attorneys. Petitioner's affidavits do not, however, incorporate the language of sections 1.02 (10)(c)(l) and (2), but instead follow the language of section 1.02 (10)(c)(3), and in other ways fail to conform to the regulation.

Thus, the affidavit of Commission Special Investigator McWilliams (Petitioner's Exhibit D) states "I have caused to be made a diligent search of the State Ethics Commission's record and have found no record indicating that, at any time prior to January 26, 2004, that [sic] the State Ethics Commission was aware of any complaint relating to [Respondent's alleged G.L. c 268A violations] (emphasis added), using the language of section 1.02 (10)(c)(3), instead of section 1.02 (10)(c)(l)'s language "the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before the order was issued." Similarly, the Assistant Attorney General's affidavit states "I have caused to be made a diligent search of the Attorney General's records and found no record prior to February 1, 2004 indicating that the [Attorney General's Office] was aware of any complaint relating to [Respondent's alleged G.L. c 268A violations] (emphasis added), again using the language of section 1.02 (10)(c)(3), instead of section 1.02 (10)(c)(2)'s language "[the Attorney General's Office] has reviewed its files and no complaint relating to the violation was received more than three (3) years before the order was issued." The several affidavits of the Assistant District Attorneys also incorporate the "was aware of any complaint" language of section 1.02 (10)(c)(3) and, in addition, fail to reference any date or timeframe for the records reviewed.

While Petitioner's affidavits fail to comply with the regulation to varying degrees, the nonconformance of Petitioner's affidavits to the Commission's statute of limitations regulation is not sufficiently significant to warrant the conclusion that Petitioner has failed to meet its burden under the regulation. Accordingly, we find that Petitioner has met its burden under 930 CMR 1.02 (10)(c) (1) and (2).

C. Respondent Has Met His Burden under 930 CMR 1.02 (10)(d)

As set forth above, under the Commission's statute of limitation regulation, if Petitioner meets its burden under 930 CMR 1.02 (10)(c), Respondent will prevail on the statute of limitations defense "only if he/she shows that more than the three (3) years before the order to show cause 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 section 23 violation only, the respondent's public agency."

Thus, where Petitioner (by submitting the required affidavits) has met its burden under 930 CMR 1.02 (10)(c), the burden of proof shifts to Respondent under 930 CMR 1.02(10)(d).

Respondent Has Shown that the Relevant Events were a matter of General Knowledge in the Community More than Three Years before the OSC Issued

As reviewed above, Respondent depends on a series of more than twenty media reports in late 2003 and early January, 2004 to establish that the relevant events relating to his alleged violations were a matter of general knowledge in the community more than three years prior to the issuance of the OSC. While these reports did not focus specifically on Respondent, they identified him by name, described his former work for EOPS and his then current work for Crest, and placed him in the middle of a controversy and investigation concerning the awarding of public safety grants by EOPS to Crest's clients prior to and after his service as EOPS grants director. While these reports did not describe the specific acts by Respondent which form the basis for the G.L. c. 268A, sections 5 and 6 violations alleged in the OSC,5 and were not inherently inconsistent with Respondent, in fact, not having engaged in any conduct in violation of the conflict of interest law,[6] we find that they contained sufficient relevant information about Respondent's conduct which is the subject of the OSC,[7] and were widely and prominently enough published, to have made "the relevant events" concerning Respondent's alleged violations "a matter of general knowledge in the community" within the meaning of 930 CMR 1.02 (10)(d), in late December 2003 and early January 2004, more than three years before the OSC issued.

Accordingly, we find that Respondent has met his burden of proof under 930 CMR 1.02 (10)(d).

D. The evidence in the record establishes that Petitioner knew or should have known of Respondent's alleged violations more than three years before the OSC issued

Even if Respondent's evidence of media reports had fallen short of establishing that the relevant events of Respondent's alleged violations were a matter of general knowledge in the community more than three years before the OSC was issued, the existence of those reports would raise the question of whether the Enforcement Division should, as a result, have made inquiry concerning Respondent's conduct and discovered his alleged violations more than three years before it issued the OSC. To the degree that question is raised, we answer it in the affirmative.

In *In the Matter of James H. Quirk*, 1998 SEC 918, the Commission looked beyond the affidavits submitted under 930 CMR 1.02 (10) to consider the Respondent's argument that there was other "undisputed evidence" in the record "from which to conclude that the Petitioner knew or should have known of the Respondent's alleged violations [more than three years before the OSC issued]." The Commission reasoned that "[t]o determine when the limitations period commenced, we must evaluate the Petitioner's level of knowledge and its duty to inquire further. 'Reasonable notice that a .. .particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations.' (citation omitted). The required level of knowledge is not notice of every fact that must be proved to support a claim, but rather knowledge that an injury has occurred, (citation omitted) The inquiry is whether, based on the information available to the Petitioner, a reasonably prudent person in the Petitioner's position should have discovered the cause of action, (citation omitted). Thus, the cause of action accrues when the Petitioner knew, 'or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action.' (citation omitted) The unknown factor, however, must be what the facts are, not the legal theory for the cause of action.' (citation omitted).'1 In *Quirk*, the Commission found that the Commission's Executive Director (and thus the Commission), through his review of a municipal counsel opinion concerning the Respondent's actions relating to his violations alleged by Petitioner in an OSC issued more than three years later, knew or should have known of the Commission's "potential causes of action" more than three years before the OSC issued and granted Respondent's motion for summary decision based upon the statute of limitations.

While here, in contrast to *Quirk*, there is no evidence in the record that the Enforcement Division or the Executive Director in fact read the media reports in question until late January 2004, the information concerning Respondent contained in the widely disseminated media reports was unquestionably available to Petitioner (through those reports) more than three years before the OSC issued. That Petitioner apparently did not read the media reports until late January 2004 does not alter this fact. In addition, while the media reports in question provided a substantially less than complete picture of the relevant events concerning Respondent's alleged violations, we conclude that the reports, if read, should have caused a reasonably prudent Enforcement Division to make inquiries concerning potential violations by Respondent under the circumstances reported in late 2003. As that was more than three years prior to the issuance of the OSC in this matter, the OSC was time-barred under 930 CMR 1.02 (10) and must be dismissed.

Conclusion

In summary, on review of the memoranda of the parties, we find that Respondent has met his burden of proof. Accordingly, Respondent's Motion to for Summary Decision is ALLOWED and the Order to Show Cause is DISMISSED as time-barred. Because we are dismissing this matter on the basis of the statute of limitations, we do not reach Respondent's other two arguments for summary decision.

DATE AUTHORIZED: September 17, 2008
DATE ISSUED: September 30, 2008

---

[1] The final two of these media reports were published within three years prior to the issuance of the OSC on January 19, 2007 and are thus not relevant to the statute of limitations issue.

[2] In Beinecke, the town treasurer and tax assessor and town counsel were involved in acts alleged to constitute violations of c. 268A. The Town brought suit, and the defendant asserted a statute of limitations defense. The Supreme Judicial Court ruled that "the statute commences to run when the plaintiff knew or should have known of the wrong." The Court analyzed what persons in Town need know of the wrong in order for the Town to be put on notice, and found that "only when those disinterested persons who are capable of acting on behalf of the town knew or should have known of the wrong, should the town be charged with such knowledge." The Court determined that because the selectmen had been appointed as agents to bring suits on behalf of the town, their knowledge would be sufficient to charge the town.

[3] *Zora*, 415 Mass. 640, 647-648 (1993) (following *Nantucket v. Beinecke* and applying the three year tort statute of limitations of G. L. c. 260, s. 2A, to Commission adjudicatory proceedings concerning alleged G. L. c. 268A violations) ; *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003(2000).

[4] *Nantucket v. Beinecke*, 379 Mass. 345, 349-351 (1979)); *In the Matter of James H. Quirk*, 1998 SEC 918, 920 (1998); *L1AM*, 431 Mass, at 1003 (The Court, finding the Commission's action not time barred stated, "the action here was not time barred because the statute of limitations would be tolled until the commission had some reason to know that a potential violation of the gratuity statute had occurred," citing *Zora* and *Beinecke*).

[5] Thus, none of the media reports stated that Respondent had participated as EOPS grants director in matters in which Crest had a financial interest while he was negotiating or had an arrangement with Crest concerning prospective employment or that, as a Crest employee, Respondent was privately compensated for work in connection with particular matters in which he had participated as EOPS grants director.

[6] Thus, Respondent could possibly have, while employed by EOPS, negotiated and arranged prospective employment with Crest (i.e., had he ceased participating as an EOPS employee in matters involving Crest and its client once there was a mutuality of interest between him and Crest concerning his prospective private employment by the firm) and, after his departure from EOPS, performed and been compensated for his Crest employment (i.e., by not being compensated by or acting as agent for Crest in connection with any matter in which he had participated as an HOPS employee) without violating any of the provisions of G.L. c. 268A.

[7] For example, as set forth above, it was reported that prior to leaving his EOPS grants director position in March 2003 to work for Crest, Respondent had worked closely with Crest's founder, St. Louis, who was submitting grant applications on behalf of his clients, that Respondent while at HOPS had assisted Crest's clients in obtaining substantial state and federal grants and that federal and state authorities were investigating EOPS grants to Crest's clients and others for possible favoritism and other irregularities by EOPS employees including Respondent

[8] Thus, Respondent's involvement as EOPS grants director in substantial grant awards to Crest's clients, his official dealings as an EOPS employee with Crest's founder, St. Louis, and his subsequent private employment by Crest, and that EOPS grants to Crest's clients were being investigated by federal and state authorities, were all reported in news articles which were prominently placed in the two leading general circulation newspapers in Boston, The Boston Globe and the Boston Herald.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 07-0039

IN THE MATTER OF
JOSEPH MAGLIONE

DECISION AND ORDER

Appearances: Karen Beth Gray, Esq.
Council for Petitioner

William F. Spallina, Esq.
Counsel for Respondent

Commissioners: Kane, Kempthorne, Veator, and King

Presiding Officer: Commissioner Matthew N. Kane

At the hearing on this matter, two employees of the Department of Public Works for the City of Revere, Anthony Giannino, Jr. and Randy Adamson, testified that their supervisor, Joseph Maglione, demanded and accepted bribes from them in connection with private contracting jobs they performed installing sewer and water lines in Revere. Maglione denied that he demanded or accepted bribes.

Ultimately, the resolution of this case depends on an assessment of the credibility of the witnesses. On one hand, Giannino and Adamson testified that they made certain payments to Maglione. On the other hand, Maglione testified that he never sought or received any such payment. As set forth below, we find that the testimony of Giannino and Adamson with regard to the bribes was not entirely credible with respect to certain key points. We find that the allegations have not been proven by a preponderance of the evidence, and therefore find in favor of the Respondent.

Procedure and Allegations

This action grew out of two other actions brought by Petitioner against Anthony Giannino, Jr. and Randy Adamson for violating G.L. c. 268A, section 17(a) by doing private water and sewer service work in the City of Revere while they worked for the City Department of Public Works. During that investigation, Giannino and Adamson testified that Maglione demanded and accepted payments from them in exchange for signing certificates of occupancy for the properties where they did private jobs. On December 11, 2007, the State Ethics Commission entered into separate disposition agreements with Giannino and Adamson in which each agreed to pay $8,000 for violating section 17(a) by engaging in the private work and section 2(a) by paying bribes to Maglione.

Also on December 11, 2007, Petitioner issued an Order to Show Cause against Maglione. Following the allowance of a Motion for a More Definite Statement, Petitioner filed An Amended Order to Show Cause ("AOTSC") on February 20, 2008.

The AOTSC alleges that Maglione, a municipal employee, violated section 2(b) by corruptly demanding and accepting payments from Giannino and Adamson in return for allowing Adamson and Giannino's private work to go forward despite the fact that they were not licensed to do it and did not get proper permits, overlooking conflict-of-interest issues, expediting or not requiring the approval process regarding adherence to building codes, and making other preferential decisions favoring Giannino and Adamson. With regard to the same conduct, the AOTSC alleges that Maglione violated section 3(b) by receiving payments for or because of the official acts or acts within his official responsibility that he performed in relation to Giannino and Adamson. Petitioner also alleges that Maglione violated section 23(b)(2) by using or attempting to use his official position to secure the unwarranted privilege of payments from Giannino and Adamson, and section 23(b)(3) by acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Giannino and Adamson could improperly influence or duly 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.

Five full days of hearing were held on March 24-26 and May 1-2, 2008. In all, twenty-seven witnesses testified.

Applicable Legal Standards

A. Preponderance of the evidence

For the Petitioner to prevail, the Commission must find that the Petitioner has proven its case by a preponderance of the evidence.[1] The preponderance of the evidence standard, as defined by the Supreme Judicial Court, is as follows:

> The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be provided. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may linger there.[2]

To meet this burden, Petitioner must persuade the Commission that, "after fairly weighing the conflicting evidence, [it] feels sure that [its] finding is supported by a greater weight of trustworthy evidence than is opposed to it."[3]

B. Credibility

Resolution of this case will require a determination about credibility of the witnesses.[4] The weight to be attached to any evidence rests in the sound discretion of the Commission. 930 CMR 1.01(9)(1)(3). If it finds that some testimony was credible and some was not credible, the Commission is required to provide a reason or explanation for so finding.[5]

Where witnesses on both sides are credible, the Petitioner will not satisfy the preponderance of the evidence standard. "The Petitioner cannot prevail 'if the question is left to guess, surmise, conjecture or speculation, so that the facts established are equally consistent [with no violation as with a violation]."[6]

Facts

Background

The water and sewer department of the Department of Public Works ("DPW") handles water and sewer installations and repairs for the City of Revere. Private contractors install or maintain the connections between the City's main water and sewer lines and residential or business properties. Typically, private contractors excavate the area between the private structure and the central utilities for the City. When a contractor performs work in a public way, a street opening permit is required. The DPW issues street permits, and the fee for the permit is $200.[7] Only licensed, bonded drain layers, approved by the City Council and the Mayor, are authorized to obtain a street opening permit. In the ordinary course, the City distributes a list of licensed, bonded drain layers to residential and business property owners.

After an inspection by the DPW, the trench can be filled in and paved over. After subsequent construction is completed, various departments of the City must sign a certificate of occupancy. A homeowner cannot move into a new home until the certificate of occupancy is completed. With respect to new construction, the DPW signed off on two lines of the Certificate of Occupancy: "Public Works (New Construction)" and "Water/Sewer (New Construction)." Before signing off, the water boxes at the site were checked to make sure the house is getting water, and the distance between the water and sewer trenches is checked to ensure that sewage will not contaminate the water supply. With respect to repairs, the DPW did not complete any certificates or any other paperwork.

Joseph Maglione is the water facilities director of the water and sewer department. He reports to the DPW's Superintendent, Donald Goodwin. Maglione has a D2 water license and a D3 full operator's license.[8] Maglione has authority to sign off on occupancy permits with respect to new water installations. At all relevant times, two other employees, Superintendent Donald Goodwin and David Fiore, the water foreman, also had authority to sign off on new water installations. Maglione had no responsibility at the DPW with respect to issuing street permits.

Anthony Giannino, Jr. was foreman of the sewer department. Giannino is Maglione's cousin. Giannino's father and Maglione's mother are brother and sister. Randy Adamson was the drain foreman in the water and sewer department. Maglione was Giannino and Adamson's supervisor. He gave them work assignments and overtime assignments. When there were emergencies, Maglione would call employees in on overtime.

While they were employed by the water and sewer department, Giannino and Adamson also did private sewer and water line work for residences in the City of Revere. Neither, however, was a licensed or bonded drain layer.

Giannino and Adamson's Private Work Before 2004

A. The Lento Property

In 2001, Giannino did private sewer work for Mark and Kerri Lento at a house near St. Mary's Church in Revere. Giannino did not get a street opening permit. Mark Lento testified that Giannino told him he was a licensed drain layer, and when he asked Giannino whether he had a permit, Giannino said he worked for the City, and "it's all set."[9] (Transcript ("Tr."), 810). Giannino used City trucks and City equipment to do the private job. Maglione and Superintendent Goodwin were aware that Giannino was doing this private work because he initially dug through church property next door and it was "the talk of the yard." (Tr., Maglione, 1223, 1225; Goodwin, 118).

The job "totally failed" on January 25, 2003. (Tr., Lento, 814; Goodwin, 117). Mark Lento called the DPW because he thought it was a City job, and after receiving no assistance, eventually called the Mayor. The Mayor called Maglione, but he refused to get involved with Giannino's side work. Thereafter, the Mayor instructed Goodwin to take care of the problem. Eventually, Goodwin dispatched City trucks, equipment and employees to re-excavate and repair the Lentos' property.

B. The Saugus Property

In August 2002, Giannino used City equipment to perform work at a private residence in Saugus, Massachusetts. A friend of Maglione's wife—who happened to live in Saugus—telephoned the Magliones to ask what Revere trucks were doing on a private site in Saugus.

There was somewhat conflicting testimony about what happened next. On the one hand, Maglione testified that he called Goodwin, who told him he knew nothing about the work in Saugus and told Maglione to see what was going on. Maglione said he found Giannino and another DPW employee, Boticelli, using City equipment at the Saugus property. Maglione testified that he told Giannino that Goodwin said to get out of there. Giannino, however, denies that Maglione told them to leave.

Goodwin acknowledges that Maglione told him afterward that Giannino and Boticelli were using City equipment in Saugus.[10] Maglione testified that he also personally complained to Mayor Ambrosino that DPW workers were using City equipment in Saugus and hand-delivered a letter dated August 28, 2002. (Ex. 32). Ambrosino recalled, however, that he learned about the Saugus incident "long after the fact" and did not recall ever seeing the letter. Carolyn Russo, administrator of the retirement fund and a friend of Maglione, testified that Maglione talked about the incident at the time and told her he had reported it to Goodwin and the Mayor.

Later in 2002, Maglione learned that Adamson began working with Giannino doing private sewer repairs in Revere. At that time, Maglione told Superintendent Goodwin that he was not happy that they were doing side work. According to Maglione, Goodwin had no response.

C. Giannino and Adamson's Private Work on Water Lines.

In 2003, Maglione learned that Giannino and Adamson were repairing water lines in addition to the sewer lines. According to Maglione, he was upset that Giannino and Adamson were "starting to touch water" because they could potentially jeopardize his license. (Tr., 1247-1248). Maglione testified that he brought it to Goodwin's attention that Giannino and Adamson were not licensed, bonded drain layers. According to Maglione, Goodwin, once again, "didn't really have a reaction." (Tr., 1247-1248). Maglione separately raised objections with Giannino, telling him "I really don't want you's touching water." (Tr., 1250). In addition, he told the Mayor that he was concerned that Adamson's and Gianinno's unlicensed work could cause contamination to the City's water system.

In the spring of 2004, Adamson bought an excavator, enabling Giannino and Adamson to dig trenches. With the excavator, Giannino and Adamson expanded their business to include both repairs and new water and sewer service installations. Maglione testified that he was upset when he learned they were doing water hookups because they never called for an inspection, but just did them and backfilled the holes after hooking up the lines.

In addition to the excavator, Adamson and Giannino used a tapping machine to drill and tap water mains in connection with their private work. According to Maglione, prior to 2003, the DPW did taps for contractors and charged them $200. In emergencies, when a private contractor's tapping machine has broken, Maglione has allowed the contractor to borrow the City's tapping machine. Ordinarily, however, private contractors used their own tapping machines or contracted with a tapping service to do the work. By contrast, all parties agree that, at least initially, without paying the City, Giannino and Adamson used the City's tapping machine to do their private contract work.

According to Maglione, he repeatedly told Superintendent Goodwin that he was concerned about Adamson's and Giannino's private work in Revere. In response, Maglione testified that Goodwin did nothing. By the spring of 2004, Maglione testified, he did not think it was worthwhile going to the Superintendent or the Mayor again because he "felt like it was starting to fall on deaf ears." (Tr., 1257). He said, "… whenever I would say to the mayor, the mayor would check with Donny [Goodwin], and Donny would always come back with a different remark for it. Always have another – another answer for it." (Tr., 1257).

In 2003 or 2004, people in the DPW yard began referring to the trio of Giannino, Adamson, Goodwin as "GAG Construction." Several witnesses testified that the term was a joke, referring to the association among the three individuals. Giannino, for example, would say, "We have another GAG job." (Tr., 1316). The DPW's water foreman, David Fiore, similarly testified that it was "an everyday occurrence" to hear the term GAG Construction. (Tr., 1062). Paul Argenzio, the DPW's general foreman, did not know whether it was an actual entity or just a term that somebody came up with.

There was no evidence that Giannino, Adamson, Goodwin were ever actually in business together. For purposes of this opinion, we need not reach that issue. In any event, Maglione testified that he saw Goodwin at some of Giannino and Adamson's private jobs. Maglione observed, "[Goodwin] protects them an awful lot." (Tr., 1406).

Spring, 2004

Beginning in the spring of 2004, there is considerable disagreement between the parties concerning the facts at issue. On the one hand, Maglione testified that his objections to this private work escalated. One day in the spring of 2004, David Fiore told Maglione that Giannino and Adamson were doing a job on Sewall Street and had closed down the water on a whole street. Upon learning that Giannino and Adamson were continuing to do private water work in Revere, Maglione got "real upset" and drove with Fiore to a greenhouse where Giannino's father, Anthony "Chicky" Giannino, Sr., worked with Maglione's mother. Maglione told Anthony Giannino, Sr. he wanted his son to stop doing side work.

Maglione testified that he said, "I want the kid to stop… [I]t's my license they're dealing with. They don't care… [but] if they screw up, it's my license … . They are going to come looking for me if there is a contamination problem. (Tr., 1261). Several witnesses corroborated the fact that Maglione objected to Giannino's private work. Fiore, Florence Maglione and Crezenso Giannino each testified that Maglione objected to Giannino's private work and asked Chicky Giannino to direct his son to cease his private work.[11]

Summarily, Carolyn Russo, the administrator of the retirement plan for the City of Revere, testified that she frequently spoke with Maglione about his continuing objections to Giannino and Adamson's private work. She said Maglione demonstrated "increasing frustration" because his objections were met with silence and Adamson and Giannino were permitted to continue their private water and sewer work in Revere.

Anthony Giannino, Sr., said they were not doing anything wrong. Maglione said that if something went wrong, everybody would be in trouble and it would affect his license.

On the other hand, the Petitioner alleges that – far from objecting to the private work – Maglione began demanding cash payments from

Giannino and Adamson. Specifically, Giannino testified that in the spring of 2004,[12] he and Maglione were walking out to Maglione's old yellow truck and talking "about a private job or something," and Maglione said, "hey, don't forget to FMI me." (Tr., 254). Maglione said that "FMI" meant "Figure me in." (Tr., 254). Maglione said, "It's my license. It's my water. It's my signature." (Tr., 255). "And that's what he told me, so everything would go smoothly." (Tr., 254-255). Afterward, in the DPW yard, Giannino told Adamson about Maglione's demand for a bribe. Adamson testified that about a week later, Maglione told him that "he wanted $200 per job or don't touch his water." (Tr., 571). He also said that Maglione told him that "it was his signature and his license, his water." (Tr., 572). They decided that, to continue doing their private work, they were going to have to pay him.

Except for this initial conversation, neither Giannino nor Adamson remembered any further specific conversations with Maglione about the payments. Rather, Giannino testified that, generally, every time they had to do a job, Maglione "would always state his license was on the line. It was his license, his water, his signature every time." (Tr., 259). When asked whether these statements continued, Giannino testified, "They – after a while, no, they stopped. Because we knew that it was a common thing that, if we touched his water, or it was a new home with his signature, we needed his signature, so we just automatically knew that we had to pay him." (Tr., Giannino, 259-260).

Adamson and Giannino offered disparate reasons for these alleged payments. First, they testified that in return for their bribes, they expected Maglione to sign off on occupancy permits. Giannino testified that Maglione had to sign off on certificates of occupancy because he had the water license, and that he did not know at the time that Goodwin or Fiore could sign off. Adamson said that they paid Maglione because he "made it so if we didn't give it to him, we wouldn't have no occupancy permit and we wouldn't have been able to do the jobs." (Tr., 605). He said that "would have crippled us." (Tr., 605). Adamson, however, acknowledged that he knew Goodwin could sign off on these certificates. Nevertheless, he said that he never went to Goodwin to sign off because Maglione had the water license.

Second, Giannino and Adamson testified that they made payments to Maglione so that they could continue to use the City's tapping machine. Adamson, for example, testified that Maglione said that if they did not give him money, they could not use the City's tapping machine. Giannino testified that every time they would do a private job requiring a tapping machine, they informed Maglione that they were going to be borrowing the DPW's machine. Giannino testified that they told Maglione on every occasion because Maglione had told them that "if there was ever an emergency in the middle of the night, he needed to know where that piece of equipment was, because he wouldn't be able to perform the job if he didn't have that or knew where it was." (Tr., 253).

Finally, there was testimony that Giannino and Adamson made these payments to keep their direct supervisor, Maglione, happy. For example, Giannino testified that he was concerned that if they did not pay Maglione for his water, then Maglione could give him less preferable job assignments or "could cut me out of overtime" and "make a lot of things very miserable for me." (Tr., 265).

The Alleged Bribes

- **Timing of the alleged bribes**

Giannino and Adamson gave varying testimony about the timing of the bribes. At the adjudicatory hearing, Adamson testified that they began paying Maglione in 2004. When the Enforcement Division deposed him on November 1, 2006, however, he had testified that they started paying Maglione two years earlier, in 2002. In particular, Adamson testified that they gave Maglione $200 for projects "five times a year since 2002." (Tr., 664, 633). Reminded of his earlier testimony, Adamson said that he did not know why he said that, and that he did not recall giving him money back then.

At the adjudicatory hearing, Giannino first testified that the period during which they paid Maglione bribes was from the summer of 2003 to the summer of 2005. He said they paid Maglione FMI throughout "the two and half year period, two year period." (Tr., 264). Later, in his testimony, he changed the starting date to 2004. He listed only ten jobs during the one-year period.

- **The properties at issue**

Giannino and Adamson similarly gave disparate testimony concerning the number of jobs at issue. Initially, Giannino testified that they paid Maglione for "20 to 30 jobs." (Tr., 264). Adamson testified that they paid Maglione "five time a year since 2002." Assuming the FMI period extended from 2002 to 2005, Maglione presumably would have received 15-20 payments.

Later, however, Adamson and Giannino revised this testimony. Instead of twenty projects, they each testified that they made payments to Maglione with respect to work they did at new homes on only eight properties. The eight properties were: 33 and 33A Sagamore Street, 111 Oxford Street, 18 Sewall Street, 6 Harrington Street, 63 Centennial Street, 37A and B Cheever Street, 13 Essex Street and 32 Pearl Street. In addition, they testified that Maglione referred them a sewer repair job at George Ave. and a water repair job at Page Street. They each testified that they paid him in cash, and that Adamson usually was the one who delivered the money to Maglione.

With respect to each of the eight properties where they installed new service, Giannino and Adamson testified that Maglione knew that these were Adamson and Giannino jobs because they told him. Except for Cheever Street, they testified that no street permit was obtained before they did the work. At Cheever Street, the homeowner had hired a contractor who obtained a street opening permit, and Giannino and Adamson did their work under his permit. Giannino testified that with respect to all of the new homes listed above, Maglione was aware that they used the City's tapping machine on the project because they told him. Giannino testified that although it was Maglione's job to do inspections, he did not inspect any of their private jobs.

- **Amount of the alleged bribes**

Giannino and Adamson have provided varying information over time about how much they paid Maglione for the private jobs. At the adjudicatory hearing, they testified that they gave Maglione $200 each time they opened a hole for a water installation. (Tr., 258, 573). For a duplex, which required two holes, they said they paid Maglione twice the amount. (Tr., 271, 573). Adamson testified, "Sometimes, if we didn't make enough money, we would give him a little less." (Tr., 573). Giannino and Adamson both specifically testified that they paid Maglione $200 for each new water installation job listed above -- $400 for Sagamore Street because it was a duplex -- and also for the repair jobs at George Street and at Page Street. (Tr., 270-306, 579-603).

This testimony differed from earlier testimony that Giannino gave at a deposition on November 1, 2006, closer to the time of the reported bribes. At that time, Giannino said that they gave Maglione $250 or $350, depending on the job. He said, "If it was two jobs, it would be two times that." (Tr., 386). He testified, "If we did only one job, it was 250. And the next one would be 250, 300. So, whatever it was, boom, he would get paid 600 from two different homes." (Tr., 386).[13]

Giannino gave two different explanations for the discrepancy between the $250 he mentioned at his deposition and the $200 he mentioned at the hearing. First, he said that the $250 was $200 for Maglione and $50 if they had to borrow the tapping machine because "when he [Maglione] was charging other contractors it was 250 every time he charged a contractor to use the tap machine." (Tr., 387). The next day, he explained: "I think I made a mistake on the 250, because I was paying Randy 250 for his machine, because he owned the machine and a dump truck." (Tr. 422). He switched from one explanation to the other after speaking with Adamson, who told him, "[t]he 250 was for the machine and the 200 was for Joe." (Tr., 423).

Giannino also gave different explanations about the $350 figure that he had mentioned at his deposition. First, he stated that the $350 figure was correct "[b]ecause if we threw him [Maglione] money, I think, there was one job that we did a sewer and a water. I don't know if we gave him $350. I didn't know my exact numbers, but I remember giving him $350 on a job." (Tr., 387).

At the adjudicatory hearing, Giannino testified that they paid Maglione $750 on Patriots Parkway. He said that $400 of the $750 was for Sagamore Street. (Tr., 389). With respect to the other $350, Giannino testified, "350 was 150 – we threw him for another job, said we ain't going to give him all of that. I think we just cut him short on it is what we did." (Tr., 389). He subsequently testified that the $350 was for "three jobs;" it was for "three other jobs" (Tr., 390); it was for "two other jobs" (Tr., 391); it was for "three altogether;" (Tr., 408); it was "[p]robably a water job that we did….Then, the two on Sagamore. That is three." (Tr., 409).

For his part, Adamson testified that they paid Maglione $400 for Sagamore because it was a duplex. (Tr., 578, 579) Of the $3,000 they made for doing the work at Sagamore Street, he remembered giving $400, not $750, to Maglione. (Tr., 657). At his deposition on November 1, 2006, however, he had testified that one time he gave Maglione $750 "because it was a big project," and that he believed it was for Sagamore Street. (Tr., 666). When he was reminded about his deposition testimony, Adamson said he believed his testimony on November 1, 2006 was incorrect. He testified that he did not give Maglione $750 solely for Sagamore Street, and he did not recall what else the $750 was for. (Tr., 667). At a different point in his testimony, Adamson also said that they gave Maglione $750 on Patriots Parkway "for a few different jobs," but did not know "which exact ones." (Tr, 575).

- **Delivery of the alleged bribes**

Adamson and Giannino each remembered only the same three specific instances when they delivered bribes to Maglione: once on Patriots Parkway, once when Maglione's son was present, and once after they discussed it in the City yard. (Tr., Adamson, 574-575; Giannino, 261-263).

With regard to Patriots Parkway, Adamson testified that they told Maglione to meet them there, they had something for him, and they met him there and gave him $750. (Tr., 575). Giannino testified that for the Sagamore job, they called Maglione and told him to meet them on Patriots Parkway, and that they handed him $750 in cash and drove off. (Tr., 262).

Giannino and Adamson told very similar stories about the instance when Maglione's son was present when they paid Maglione, although, upon analysis, each said he was the driver:

Giannino: I remember being on – we were going on Revere Street. I was driving. Randy [Adamson] was in the passenger. We pulled Joe over, gave Randy the money. He pulled it out of his pocket transferred it over to him. His son was in the truck when Randy gave him the money." (Tr., 263).

He said thank you." (Tr., 266).

Adamson: I was driving down Revere Street. I beeped to Joe. I pulled up alongside of him. And I had $200 in my hand. And I handed it out the window to his son. And his son handed it to him and Joe said thank you." (Tr., 574).

Both witnesses also testified similarly about the incident when Adamson told Giannino to give Maglione a partial payment:

Adamson: And one time, Joe was hounding – hounding us for the money. And we didn't have it at the time. And then, I just – I gave $150 to Anthony. I said, 'here, just go get it to him and get him off our ear.' And that was in the City yard." (Tr., 575).

Giannino: Down the department of public works, yes…. I remember Randy coming to me and said that he was – Joe was nagging him about paying about a certain job we had did maybe two weeks before that. He just goes – he goes, "just go pay him. Get it done. Just go give it to him." (Tr., 263).

Besides the few incidents he mentioned, Adamson testified that he could not remember any other incidents when he paid Maglione. Adamson stated, "Just because it became such nonchalant, just after the job, gave it to him. It was just routine." (Tr., 576).

Adamson was asked whether he recalled any particular discussions with Maglione where they talked about the bribes being for any of the ten projects they did. Adamson explained, "Each time I would give Maglione the money, I'd just say this was for Oxford, this was for this one, this was for that. I would say it each time I gave it to him." He said that Maglione said, "Thank you." (Tr., 693). Adamson said that there was not anything else that stood out in his mind from those conversations at all.

- **Maglione's testimony about the alleged bribes**

For his part, Maglione consistently stated that he did not demand or accept payments from

Giannino and Adamson. He specifically denied receiving bribes for their work at Sagamore Street, Oxford Street, Sewall Street, Harrington Avenue, Centennial Avenue, Cheever Street; Essex Street; and Pearl Avenue. He also denied demanding or accepting payments for the two repair jobs which Giannino and Adamson say he referred to them: George Ave. and Page Street.

Maglione testified that Giannino and Adamson never told him they were going to do a job. He testified that he overheard them talk about the jobs, heard about their jobs from other people, saw trenches or found out about their jobs long after the fact or when it was time to sign off.[14]

Maglione specifically denied taking any money from Giannino and Adamson to allow them to use the tapping machine. He testified that he found out that they used the tapping machine for their private jobs "after the fact." (Tr., 1496).

Maglione indicated that he did not excuse Giannino and Adamson from requirements with regard to pulling street opening permits or getting inspections with regard to these jobs. He testified that he had no responsibility for issuing street opening permits. He acknowledged that he did not check to see whether Giannino and Adamson had pulled street opening permits when he was signing off on certificates of occupancy, but testified that it was not normal procedure to do so. Maglione said that he brought it to Goodwin's attention that Giannino and Adamson were not getting street permits, and nothing was said about it. Maglione also confirmed that he did not do inspections of Giannino and Adamson's private work, but protested that he never was called to do any inspections of their work.

- **Sign-offs on certificates of occupancy**

The following chart shows the dates when sign-offs were done on certificates of occupancy for the nine properties for which Giannino and Adamson say they paid Maglione bribes, and who signed off.

Ex No	Property	Date of sign off	Who signed off
19	33A Sagamore St.	11/30/04	Goodwin
20	33 Sagamore St., Unit B	11/30/04	Goodwin
24	111 Oxford St.	12/20/04	Goodwin
23	18 Sewell St	2/2/05	Maglione
17	6 Harrington St.	6/23/05	Maglione
18	63 Centennial St.	7/19/05	Maglione
21	37A & B Cheever St.	2/21/06	Maglione
25	13 Essex St.	3/3/06	Maglione
22	32 Pearl Ave.	6/23/06	Goodwin

- **Sign-Offs – End of 2004**

Giannino and Adamson testified that they made payments to Maglione for the two units at Sagamore Street and for Oxford Street. Yet, Superintendent Goodwin, not Maglione, signed off on the "Water/Sewer New Construction" line for these properties.

Goodwin and Maglione gave contradictory testimony on why Goodwin signed off. Goodwin testified that he signed off on these three certificates only after speaking with Maglione.[15] On the other hand, Maglione testified that Goodwin signed off on Sagamore Street and Oxford Street because he refused to do it. He indicated that the authority he should have had because of his water license was undermined when Goodwin overruled him.[16]

In any event, both Maglione and Goodwin testified that, in late 2004 or early 2005, Maglione met with the Mayor and asked to have exclusive sign-off rights on certificates of occupancy.

Maglione testified that around this time, he had disputes with Giannino and Adamson because they failed to respond when the night watchman would call them in for emergency work, so he would have to go out himself on the calls. He said that it was an "unwritten rule to be on call 24 hours." (Tr., 1422). Maglione said that he spoke to Goodwin and the Mayor about Giannino and Adamson's failure to respond to emergency calls. The Mayor recalled having conversations about the issue with Maglione. The night watchman, Thomas Feeley, also confirmed that there were times he was unable to reach Giannino and Adamson, and that he spoke several times to Goodwin about it.

- **Sign-Offs – Mid-2005**

Maglione acknowledges that he signed three certificates of occupancy for Sewall Street, Harrington Street and Centennial Street between February and July, 2005. Petitioner contends that Maglione signed off because Giannino and Adamson were paying him bribes. Maglione testified that he signed off because the Superintendent and the Mayor had no problem with Giannino and Adamson doing private jobs, and "[n]obody else seemed to care that they were doing the work." (Tr., 1269-1270). He testified that he signed off on these three properties "in the midst of me trying to get them to stop their work" or "in the midst of arguing my point about their work." (Tr., 1370; 1373.) In addition, Maglione was aware that his refusal to sign these certificates could delay the homeowners from taking occupancy. He testified that he did not think that the homeowner should suffer delay under these circumstances.

Although Maglione signed these three certificates, there was evidence that he continued to object to Giannino and Adamson's private work in the city. In March 2005, for example, Maglione and Paul Argenzio, the general foreman, were in the Fenno Street neighborhood where Adamson and Giannino has been doing some private work. Revere City Counselor George Rotondo lived nearby. Maglione, Argenzio and Rotondo discussed the fact that these two DPW workers were doing private contract work in the city. According to Maglione, Rotondo was asking a lot of questions about procedures for water, sewer and drain work and had gotten some complaints about work that Giannino did. (Tr.,1334). Maglione told him that he "was fighting a losing battle, because I've talked to everybody about it … they say it's okay for them to do it." (Tr., 1334-1335).

Rotondo similarly testified that, at Fenno Street, Maglione told him that Giannino and Adamson were doing drain laying work and had poor workmanship. Maglione told him that he had complained to the Mayor, Goodwin, "to everybody and no one is doing a damn thing about it." (Tr., 1139; 1133-1134). Rotondo took notes of the conversation on a newspaper dated March 16, 2005. (Tr., 1134; Ex. C for identification).

- **Late Summer, Early Fall, 2005: The payments stop**

Adamson testified, and Giannino confirmed, that they "just decided" to stop paying Maglione. Giannino stated that they did this in the summer of 2005; Adamson said it was in late August or early September. (Tr., Giannino, 309, 312; Adamson, 606). Neither offered any particular reason for stopping the payments. Instead, they simply testified, "Just didn't want to do it no more. Just didn't want to pay him no more." (Tr., Adamson, 682).

Adamson testified to the following:

Q: Did FMI, at some point, stop?
A: Yes, it did.

Q: Why?
A: Because, we just got tired of giving him money. And we just decided that we wasn't going to give it to him no more.

Q: Was Mr. Maglione informed that you were not going to pay FMI any longer?
A: Yes.

Q: How was he informed?
A: He came up to me one day and asked me if I forgot him on a job. And I told him right out that I didn't forget him. And I just walked away from him.

Q: Did anything happen next?
A: Then, a day or two later, he came up to me again and asked me if I forgot him again. And I said, "No, I didn't forget you." And I just walked away again.

That was my way of telling him it was over.

(Tr., 605).

Q: What was it that made you decide to stop paying him?
A: Just did.

Q: So you started –
A: Just didn't want to give him no more money.

(Tr., 650).

Q: And what made you decide to do that that day? What had happened? Or prior to that day, that made you decide to do that?
A: We just decided we weren't going to give him no more money. And we were just going to go and get – use other contractors and

just do it and get our own tapping machine and have nothing to do with him.

Q: And why did you not want to pay him any more money at that point?
A: Because just -- he wasn't doing nothing for workwise to give him money. I just felt like it wasn't in our best interest to give it to him anymore.

(Tr., 651-652).

Giannino's explanation included more detail about the way they made the decision, but not about the reason. He testified that they stopped paying Maglione in the summer of 2005. (Tr., 309).

Q: Why?
A: We got tired of paying him for nothing.

Q: Were you going to continue doing work?
A: Randy and I were sitting down talking how we were going to do this. This was in the summer of 2005, just before the end of 2005. And he said, well, "we have to buy our own tap machine, because we aren't going to – we can't do it unless we have a tap machine. It ain't going to be any good for us if we do a new home." And we would have the people pull up permits for us. And then, we would get around it and not have to deal with it anymore.

(Tr., 310).

On direct examination, Giannino testified:

Q: Was there a certain project that stopped the FMI?
A: No, not that I know of. No.

Q: No?
A: No.

Q: Was FMI ever brought up again?
A: No, it was not.

(Tr., 312).

- **Sign-Offs – September 2005 Forward**

Giannino testified that in the fall of 2005, Maglione refused to sign off on certificates of occupancy unless he and Adamson got street opening permits. Adamson and Giannino testified that Maglione first began to refuse to sign off on occupancy permits only after their payments to Maglione allegedly stopped. Giannino testified that they called a contractor after the fact and asked him to pull street opening permits for the work they previously had done at Pearl Ave. and Essex Street. Goodwin issued street opening permits to the contractor for Pearl Ave. on September 9, 2005 and for Essex Street on October 7, 2005. (Ex. 27, 28).

Not surprisingly, Maglione offers a different explanation for his refusal to sign certificates in late 2005. According to Maglione, he "had had it" by the fall of 2005 (Tr., 1270). He said there was an "Ethics thing going on" and "people were starting to look into it a lot." (Tr., 1271). He testified, "George Rotondo had come to me that he wasn't happy. Other politicians were talking about it." (Tr., 1271). Specifically, Rotondo found out that Giannino and Adamson had not pulled a street opening permit for their work on Essex Street and "had done a ton of jobs like that." (Tr., 1142-1143). Mayor Ambrosino, Superintendent Goodwin and Giannino all confirmed that Rotondo was asking questions about Giannino and Adamson's private work in the fall of 2005.

Meanwhile, tensions increased at the DPW. There is some dispute about when the next events occurred. Maglione, responding to an emergency, found that the tapping machine was missing and discovered that it was at Giannino's house. He complained to Goodwin, who retrieved the tapping machine and moved it from the water bay, where it was accessible to all of the water department employees, to his own office. Adamson and Goodwin testified that the tapping machine was moved in September or the late summer or early fall of 2005. Maglione said it happened after the water break at Essex Street on January 12, 2006. Giannino and Adamson subsequently moved out of the office they shared with Maglione to an office down the hall. Goodwin says that this happened in late 2005; Maglione's diary reminded him it was on February 16, 2006.

On February 21, 2006, Giannino and Adamson purchased their own tapping machine. According to Giannino, they did not purchase a tapping machine earlier because they did not have enough money to purchase the machine. When pressed about whether he actually did have enough money earlier, Giannino revealed that he had won a million dollars on a scratch ticket in the lottery, but testified that he did not win the lottery until November, 2006. He mentioned this date three times. A UCC Statement subsequently entered into evidence, however, showed that he won the lottery in November, 2005. (Ex. 31).

At the beginning of 2006, Rotondo brought his concerns about Giannino and Adamson's private work before the City Council. In February, 2006, the City Council passed a motion asking the Mayor to write to the Ethics Commission to ask whether DPW employees could do private work in Revere.

The Mayor, Goodwin and Maglione all testified that Maglione and Goodwin met with the Mayor in February, 2006 because Maglione refused to sign off on certificates of occupancy for work Giannino and Adamson did at Cheever Street and Essex Street.[17] Maglione's work diary indicates that the meeting occurred on February 17, 2006. Maglione testified that he called the meeting because he was not going to sign off on any more certificates of occupancy for Giannino and Adamson's private work.

The Mayor recalled that at the meeting, a couple of homeowners were looking for occupancy permits. The Mayor did not want the homeowners to be prevented from taking occupancy if the work was sufficient. Accordingly, the Mayor instructed Maglione to satisfy himself that the connections were correct, and asked him to sign off. The Mayor testified: "If the connection is correct, if they have done the work properly, forget about whether they had permits. Forget about whether it is ethical. If they have connected properly to the system, I am instructing you to sign off on it. I'll take responsibility for all the other stuff, because that's really my purview." (Tr., 503-504). The Mayor described Maglione as "fairly resistant." Ultimately, Maglione testified that he agreed to sign off on these last three houses because he "felt bad for the poor contractor…for the poor homeowner, the person that's building a house, that they get stuck in the middle of something that's going on like that." (Tr., 1283, 1284). Maglione told the Mayor that these would be the last certificates of occupancy he would sign for Giannino and Adamson's work.

Maglione signed occupancy permits for 37A & B Cheever Street on February 21, 2006. (Ex. 21). Maglione required Giannino and Adamson to re-excavate at Essex Street and do the proper repairs to satisfy him before he agreed to sign off. He signed off on the certificate of occupancy for 13 Essex Street on March 3, 2006. (Ex. 25). Maglione did not sign off on any more certificates of occupancy for Giannino and Adamson's work. Goodwin signed off on the Pearl Ave. occupancy permit on June 23, 2006. Goodwin testified, "At this point in time, Joe was kind of upset about what was going on and transpiring and he wasn't inclined to sign off. So, I signed off." (Tr., 93).

The Mayor wrote to the Ethics Commission on March 6, 2006, asking for an opinion about whether DPW employees could do private work. (Ex. 5). On March 22, 2006, the Ethics Comission sent the Mayor an opinion saying that DPW employees could not do private work. (Ex. 14). The Mayor notified Giannino and Adamson that they could no longer do private work.

Meanwhile, during this period of public scrutiny, Giannino and Adamson flatly denied any alleged bribes in connection with their private work. In an article on March 1, 2006, Giannino was quoted in the Revere Journal as saying, "there had been no corruption here whatsoever. There were no kickbacks, no pay offs." (Tr., 323, 328). Giannino testified that the reporter had asked him about a rumor that Goodwin had been getting kickbacks. Giannino testified that he therefore intended his answer to be limited only to Goodwin. (Tr., 323).

However, the reporter, Seth Gordon Daniel, testified that he was not asking about Goodwin. Daniel stated that he met with both Giannino and Adamson, and testified as follows:

Q: When you were meeting with them, and asking them about this subject, who – whose involvement were you inquiring about?
A: Anthony Giannino Jr. and Randy Adamson.

Q: And that response that you have in the paper that you got from Mr. Giannino Jr., was that in reference to your inquiry about his involvement or someone else's?
A: His and Randy Adamson's.

Q: Okay. If I were to suggest to you, that Mr. Giannino said you were asking about Donald Goodwin, what would your response be?
A: No, that's not true.

(Tr., 796).

In June, 2006, the Enforcement Division received a complaint about Giannino and Adamson's private work and subsequently called Giannino and Adamson in for depositions in early November, 2006. Both Giannino and Adamson testified that they brought up the payments they made to Maglione when the Enforcement Division questioned them in November, 2006 about why they were able to do their private jobs without getting permits. Each testified that this was the first time they told anyone about the payments to Maglione.

Legal Analysis

A. Giannino and Adamson's testimony about the bribes is not credible.

The only proof of bribes offered at the hearing was Giannino and Adamson's testimony. No witness besides Giannino and Adamson corroborates their testimony about the payments. Nor were there any documents concerning the alleged payments. Consequently, a determination about whether Maglione bribed Giannino and Adamson depends on whether Giannino and Adamson's testimony is credible.

In weighing their testimony, we are cognizant that both Adamson and Giannino made statements against their own interest. During their deposition testimony, both men implicated themselves in the scheme that gives rise to the present action. They each testified under oath that they made payments to Maglione in connection with the private work that they were doing in Revere. In addition, each man acknowledged, in their respective disposition agreements, that these payments constituted violations of G.L. c. 268A, section 2(a).

Statements against interest are generally very persuasive evidence.[17] They are not, however conclusive. Here, these statements must be evaluated in the context of Adamson and Giannino's testimony—and the conflicting testimony from Maglione and other witnesses--in this case. As set forth below, Giannino and Adamson's testimony is inconsistent on certain key facts—including the existence of the payments, the timing and amount of the alleged payments, and the alleged purpose for these advancements. As a result, we find that Petitioner has failed to meet its burden of proof.

Giannino offered wholly contradictory stories concerning the very existence of these bribes. On March 1, 2006, Giannino categorically denied any bribes. At that time, he told a newspaper reporter that there was "no corruption here whatsoever" and "no kickbacks, no payoffs." In the present case, Giannino's story has obviously changed; he now says that he and Adamson made a series of "kickbacks" and "payoffs" to Maglione. In an attempt to explain this apparent inconsistency, Giannino said that his statement to the newspaper was limited to denying any alleged payments to Donald Goodwin. The newspaper story, however, does not suggest any such limitation. In addition, the newspaper reporter testified that his questions were not limited to Mr. Goodwin. (Tr., 796). We therefore do not credit Giannino's testimony that his statements to the reporter were intended to be limited to alleged payments to Goodwin.

Second, Giannino and Adamson wavered on the period of these alleged bribes. Initially, Adamson testified that these bribes began in 2002. Later, he suggested that the bribes did not begin until 2004—two years later. For his part, Giannino initially testified that the bribes began in 2003 and later changed his testimony, saying that the bribes did not begin until 2004. (Tr., 264, 465-468). As a result, it is unclear when precisely the alleged payments took place.

Third, Giannino and Adamson offered contradictory testimony on the amount of bribes at issue. At the hearing, both men testified that they paid Maglione $200 each time they did a water installation. Yet, at his deposition, Giannino testified that they paid $250 to $350 depending on the job. (Tr., 386).

Having offered these disparate figures, Mr. Giannino found himself caught in a math problem at the hearing. In particular, he testified that they gave Maglione $750 on one occasion in their trucks on Patriots Parkway. According to Giannino, $400 of the $750 was payment for two water hook-ups at Sagamore Street. (Tr., 389). Giannino, however, could not account for the remaining $350. He initially testified that the remaining $350 was for "three other jobs" and then changed his testimony, saying that it was for "two other jobs." (Tr., 390, 408, 409). Even still, the math did not add up; if they paid Mr. Maglione $200 per installation, then two jobs would have amounted to $400, not the $350 at issue. Adamson also could not explain the arithmetic regarding the $750 payment. (Tr., 575, 657, 666, 667).

Fourth, Giannino and Adamson's proffered explanation for the rationale of these payments stretches credulity. Initially, they said that they paid Maglione in exchange for his sign-off on occupancy certificates. The undisputed facts, however, make clear that Mr. Maglione did not have exclusive authority in this area. Indeed, both Mr. Goodwin and Mr. Fiore could—and in some instances did-- sign off on these certificates. In fact, Petitioner's theory in this case is that Maglione approved a series of six certificates of occupancy during 2004-2005 (for 33 and 33A Sagamore Street, 111 Oxford Street, 18 Sewall Street, 5 Harrington Street, and 63 Centennial Street) because he received payments to do so. The central problem with this theory, however, is that the first three certificates of occupancy for Sagamore Street and Oxford Street were signed by Goodwin.[19] As a result, Giannino and Adamson were not dependent on Maglione to approve their work, as Petitioner suggests.

Perhaps realizing the thin nature of this rationale, Giannino and Adamson offered another explanation for the payments. They testified that they felt they had to pay Maglione because otherwise he would reduce their overtime assignments. Yet, the record makes clear that they had little interest in additional work. To the contrary, several witnesses testified that Giannino and Adamson were difficult to reach during off-hours and that they failed to respond to emergency calls.

Alternatively, Giannino and Adamson suggested that they made these payments so that they could continue to access the city's tapping machine. This rationale is similarly unconvincing. As a preliminary matter, Giannino and Adamson testified that they ceased payments in the summer of 2005 and did not seek to purchase a tapping machine until months later at the beginning of 2006. If the tapping machine was (as they now suggest) crucial to their business, they would not have waited so long to purchase a machine—particularly given Mr. Giannino's good fortune of winning the lottery in November 2005. More importantly, neither man mentioned the tapping machine as any kind of rationale for these payments when they were first deposed in November 2006. It therefore seems to be a more recent explanation for the alleged payments.

Finally, the accounts that both Adamson and Giannino gave about their decision to discontinue payments to Maglione in the late summer or early fall of 2005 were not credible. They each testified that they simply stopped payments arbitrarily. Neither man provided any reason why they chose to stop these payments at that time rather than any other point in time. If these payments were as crucial as they first described, it does not make any sense that they would simply stop the payments and seek to continue business as usual.

All of these facts are obviously weighed in a broader context. Here, there was evidence to suggest that Giannino and Adamson had a somewhat casual regard for the truth. By their own accounts, Adamson and Giannino secretly paid bribes to their supervisor to overlook shoddy and nonconforming work. In and of itself, this alleged scheme suggests some degree of deception. Homeowners such as the Lentos were deceived that these two individuals had the ability and authority to perform the work as promised. Even today, Mr. Giannino's testimony suggests a belief that he was entitled to cut corners. For example, with regard to whether he knew that he needed a street opening permit to do the private job for the Lento family in 2001, Giannino "thought that, because we worked for the City, maybe we had a little leeway and stuff like that." (Tr., 457). "… I thought, maybe where I worked for the City of Revere that I would be able to – we would be able to get away with it." (Tr., 459).

Perhaps most startling, Giannino claims not to remember the date when he won a million dollars on a lottery scratch ticket. That fact was somewhat relevant to the issue of Giannino's ability to purchase a tapping machine. More importantly, Giannino's professed lack of memory on this point is surprising enough to raise larger questions about either his memory or his credibility.

At the same time, witnesses including Mayor Ambrosino and Councilman Rotondo testified that, in their experience, Maglione was truthful or honest. Three other City Councillors testified that Maglione enjoys a positive reputation in the local community for truth and veracity.[20] Three contractors who dealt with Maglione as a City inspector praised his professional conduct and testified that Maglione never asked them for a bribe or kickback.[21]

Of greater significance, several witnesses corroborated Mr. Maglione's testimony on several key facts. Caroline Russo, for example, corroborated that Mr. Maglione objected to Giannino and Adamson's private work dating back to at least 2002. We credit Russo's testimony and therefore find that Maglione did not—as the Petitioner suggests—begin his objections only after the alleged payments stopped in 2005.

Similarly, David Fiore, Florence Maglione and Crezenso Giannino all corroborated Maglione's testimony concerning the events in the greenhouse in 2004. All of these witnesses testified that Maglione was upset and confronted Giannino's father in an attempt to have him stop his son's private water work in Revere.

In addition, Councilman George Rotondo corroborated Maglione's testimony concerning the events on Fenno Street in March 2005. Rotondo testified that Maglione complained to him about the poor quality of Giannino and Adamson's private work and his futile attempts to get the Mayor or Goodwin to stop their work.

Finally, the Mayor and Goodwin corroborated Maglione's testimony concerning his refusal to sign certain certificates at the beginning of 2006.

At bottom, Giannino and Adamson's testimony was too lacking in detail and unspecific, and in some instances too confused and contradictory, to credibly support a finding that Maglione demanded and accepted bribes from them. At the same time, Maglione offered credibile evidence that he objected to the private work at issue and never sought or received any payments. Taken together, we cannot conclude that Petitioner has met its burden of proving the alleged payments by a preponderance of evidence. As a result, we find for the Respondent.

Conclusion

For the reasons set forth above, the Petitioner has not met its burden of proof. Our resolution of the difficult credibility issues presented by this case should be regarded as a critical assessment of the various witnesses' testimony, and not in any way as a criticism of Petitioner's counsel. The quality of advocacy on both sides in this matter was exemplary. However, after weighing the evidence, the Commission concludes that Petitioner has not proven, by a preponderance of the evidence, that Maglione violated G.L. c. 268A, sections 2(b), 3(b), 23(b)(2), and 23(b)(3).

DATE AUTHORIZED: October 17, 2008
DATE ISSUED: October 23, 2008

---

[1] *In re Kinsella*, 1996 SEC 833, 835.

[2] *Sargent v. Massachusetts Accident Company*, 307 Mass. 246, 250 (1940), *Kinsella, supra*, 1996 SEC at 835 n.8.

[3] *Callahan v. Fleischman*, 262 Mass. 437, 438 (1928); *Kinsella, supra*, 1996 SEC at 835 n.8.

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

[5] *See Kinsella*, *supra,* 1996 SEC at 835.

[6] *Kinsella*, *supra*, 1996 SEC at 835, *quoting Tartas' Case*, 328 Mass. 585 (1952).

[7] Both Superintendent Goodwin and Maglione testified that during the period relevant to the allegations in this case, it was not necessary to check whether a street opening permit had been paid for in order for the occupancy permit to be signed.

[8] The Department of Environmental Protection requires that the City have someone with these licenses.

[9] Cheryl Ciccolo also testified that Adamson identified himself as a "the City contractor" when he spoke to her about doing a drain repair at her home on Calumet Street in September, 2004. (Tr., 1015).

[10] Maglione testified that, in Saugus, Giannino told him that Goodwin knew that he and Boticelli were there. According to Maglione, when he later confronted Goodwin about sending him to Saugus if he knew they were there, Goodwin denied knowing they were there.

[11] For his part, Chicky Giannino claims to have no memory of any conversation in the greenhouse.

[12] Giannino first testified that the conversation about a bribe took place in the spring of 2003, but corrected his testimony

on cross-examination, remembering that Adamson did not get his excavator until 2004. (Tr., 465-468).

[13] The $250 figure also appeared on a chart that Petitioner submitted as an answer to an interrogatory asking how much money they paid Maglione for each job. (Ex. 33). The chart indicated they paid Maglione $750 for Sagamore Street, $500 for Cheever Street, and $250 for each of the other eight jobs listed above. Giannino testified that he did not participate in creating the chart, and Adamson said that he saw it for the first time only the week before. Adamson was asked about a $250 figure for Pearl Street on the chart. He testified, "I don't know where the $250 came in. Because he [Maglione] asked for $200 and I gave him just the 200. I don't know where that 250 come in." (Tr., 663). Shown the $500 figure for Cheever Street on the chart, Adamson testified that they paid Maglione $200, not $500, for Cheever Street. Giannino testified that he did not know anything about the $500 figure for Cheever Street.

[14] Maglione testified as follows: He found out about Giannino and Adamson's work at Sagamore Street because he got a call from City Councillor John Powers the night the street was torn up. He then drove by and saw Powers, Goodwin, Giannino, his father and Adamson at the property. He found out about Oxford Street "after the fact" and did not even recognize the house when he went up there. (Tr, 136-1366). He first heard about their work at Sewall Street when he and David Fiore were driving by the cross street nearby and Fiore told him they had closed the water down on the street. He found out about Harrington Street from Richie Sarro and his mother, who worked across the street from the property, and about Centennial Ave. from Carol Sinclair who was an abutter to the property. He first learned about their work at Cheever Street at the time he was asked to sign off. He found out they had done work on Essex Street when there later was a water break. He said they "supposedly did water and sewer" at Pearl Ave. (Tr., 1374). Giannino and Adamson testified that Maglione referred them the repair jobs at George Street and Page Street. Maglione, however, stated that at George Street, he gave a list of drain layers to the homeowners at George Street and found out "[s]ome time long after the fact" that Giannino and Adamson did the work, and that he drove down Page Street to figure out what work they had done. (Tr., 1374, 1375).

[15] For example, Goodwin testified that before he signed off on the occupancy permits for 33A Sagamore Street, "I had talked to Mr. Maglione about the work that was done previously." (Tr., 89). He stated that he was clear about that. (Tr., 89). About the occupancy permit for 33 Sagamore Street, he said, "I spoke to Mr. Maglione, found everything was in order, so I didn't --" By "everything in order," he meant, "If I had inspected it to make sure that – and obviously, we went back after we put the sidewalks in to make sure the shut offs worked properly." (Tr., 90-91). With regard to Oxford Street, Goodwin similarly testified, "I spoke to Mr. Maglione previous to signing off." He did this "[b]ecause I hadn't inspected it." Goodwin testified that Mr. Maglione indicated "whether the property had been inspected." Goodwin "confirmed that before I signed off." (Tr., 97).

[16] At the hearing, when Maglione was asked whether he was the ultimate authority on the water and sewer line on new construction, first he said, "I would say, it's what's supposed to be." Then he said, "Not me alone. There are documents here that Don Goodwin signed under water and sewer." Petitioner's counsel asked, "You are the ultimate authority; is it correct?" Maglione testified, "That was until I got overridden by – " (Tr., 1459-1460). When asked who could sign off on certificates of occupancy, Maglione said, "Don Goodwin, and so forth, for whatever reason, that's why I had disagreements with the mayor and different things, felt that he could sign it." (Tr., 1461). With regard to a later meeting with the Mayor in February, 2006, Petitioner asked, "did you have the understanding that you were the only person who could sign off on that line?" Maglione replied, "No. Because Don Goodwin had signed – signed off on it before…. But I felt – but I felt, with the water being my jurisdiction, I should be the only one to sign off on the water…" (Tr., 1463). With regard to the Pearl St. certificate of occupancy, which Goodwin signed in June, 2006, Maglione testified, "I was overridden again." (Tr., 1464).

[17] The Mayor thought the meeting was in the fall of 2005, but after looking at the date of the Essex Street occupancy permit, he testified that the meeting was in late February, early March of 2006. He did not remember Cheever, and thought that they talked about Essex Street and Pearl Ave. at the same time, but conceded that he might have mixed up some conversations.

[18] *See* 5 Wigmore on Evidence s. 1457 (Chadbourne rev. 1974), *quoting Gibblehouse v. Stong*, 3 Rawle 437, 438 (Pa. 1832) ("Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest.").

[19] Petitioner's position is that Goodwin signed those three certificates after Maglione approved them, but Maglione testified that he refused to sign them and that Goodwin overruled him. We are not persuaded that Maglione approved the Sagamore Street and Oxford Street certificates. First, the signatures on the certificates of occupancy are Goodwin's, and if Maglione was available to sign them, there was no explanation about why he did not sign them himself. Second, Goodwin's testimony on this point was equivocal. Finally, the fact that Maglione petitioned the Mayor for exclusive sign-off rights close to the time when Goodwin signed off on the three certificates suggests that Maglione had not agreed to these certificates. For all these reasons, we find unpersuasive the contention that Maglione approved the three certificates of occupancy for Sagamore and Oxford Streets.

[20] See testimony of Councilman John Powers (prior to the bribery investigation, he "never heard anything negative" about Maglione) (Tr., 558); Councilman Robert J. Haas, Jr. ("my experience has been excellent") (Tr., 780) and Councilman John R. Coreggio (Maglione's reputation was "of the highest standards") (Tr., 790).

[21] See testimony of Scott Karpinski (Tr. 1032, 1033); John Granese (Tr., 1037; 1038); Stephen Caruso (Tr., 1108; 1110).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0017

IN THE MATTER OF
JOSEPH SLATTERY

DISPOSITION AGREEMENT

The State Ethics Commission and Joseph Slattery 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, s. 4(j).

On December 14, 2006, pursuant to G.L. c. 268B, s. 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Slattery. The Commission has concluded its inquiry and, on January 16, 2008, found reasonable cause to believe that Slattery violated G.L. c. 268A, sections 20 & 21A.

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

Findings of Fact

1. Slattery has been the paid full-time Southampton Water Department Superintendent since his appointment in or about 1996.

2. Slattery also served as an unpaid elected member of the Southampton Board of Health ("BOH") from in or about 1999 until his resignation on or about January 14, 2008. The Town of Southampton has designated BOH members as special municipal employees for purposes of G.L. c. 268A.

3. In January 2005, the BOH appointed Slattery as the paid BOH health agent. Slattery served as health agent until his resignation on or about January 14, 2008.

4. The BOH health agent is responsible for conducting on site tests and inspections for BOH purposes. The health agent is supervised by the BOH.

5. At no time did the Southampton town meeting approve Slattery's appointment as health agent.

Conclusions of Law

6. As the Water Department Superintendent, Slattery is a municipal employee as that term is defined in G.L. c. 268A, s. 1(g).

7. As a BOH member, Slattery was a special municipal employee as that term is defined in G.L. c. 268A, section 1(n).

Section 20

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

9. Slattery's agreement with the BOH to serve as paid health agent was a contract made by the BOH, a Southampton municipal agency, in which the Town of Southampton was an interested party and in which Slattery had a direct financial interest.

10. Slattery knew of his financial interest in the contract.

11. There are exemptions from section 20's restrictions, however, Slattery did not comply with the requirements of any of those exemptions.

12. Therefore, by agreeing to serve and by serving as the paid BOH health agent in addition to his other municipal positions, Slattery violated s. 20.

Section 21A

13. Section 21A of G.L. c. 268A provides that a member of a municipal board is not eligible to be appointed to a position under the supervision of that board, unless an appointment has first been approved at an annual town meeting.

14. In January 2005, while Slattery was a member of the BOH, the BOH appointed Slattery to the health agent position.

15. The health agent is under the supervision of the BOH.

16. At no time did the Southampton town meeting approve Slattery's appointment as health agent.

17. Therefore, by accepting the appoint-ment as BOH health agent while serving on the BOH, Slattery violated s. 21A.

Resolution

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

(1) that Slattery pay to the Commission the sum of $4,000 as a civil penalty for violating G.L. c. 268A, sections 20 and 21A; and

(2) that Slattery waive all rights to contest, in this or any other admin-istrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: October 29, 2008

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 07-0008

IN THE MATTER OF
CHARLES LINCOLN

ORDER TERMINATING ADJUDICATORY PROCEEDING

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Kenneth H. Anderson, Esq.
Counsel for Respondent

Commissioners: Daher, Ch., Kane, Kempthorne, Veator and King.

Presiding Officer: Chairman E. George Daher

The Order to Show Cause ("OTSC") in this case alleges that there was a three-year period from January 23, 2001 until January 8, 2004 when Respondent Charles Lincoln ("Lincoln") held a full-time job with the Brockton Police Department ("BPD") and a second full-time job as Director of Security at the Plymouth County Correctional Facility for the Plymouth County Sheriff's Department ("PCSD"). The OTSC alleges that Lincoln used a total of approximately 222 sick leave days at the BPD, and that on 148 of these days, he worked a full shift at PCSD. It is further alleged that Lincoln called in sick to the PCSD on 29 days, and that on seven of these days he put in a full shift at the BPD. The OTSC further alleges that in January 2004 Lincoln submitted a retirement application based on both of his positions, and subsequently received monthly retirement benefit checks based on the combined salary figure for both positions of $177,569.

The OTSC alleges that, both as a municipal employee of the City of Brockton and as a county employee of Plymouth County, Lincoln violated G.L. c. 268A, section 23(b)(2) by engaging in the conduct described above. Section 23(b)(2) provides as follows:

(b) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know… :

(2) use or attempt 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 OTSC alleges more specifically that sick leave pay is a privilege, and that the 155 days of sick leave pay that Lincoln earned from one job while working at his other job were unwarranted because they were not received for legitimate sick leave purposes. It also alleges that retirement benefits are a privilege, and that each of Lincoln's retirement checks was an unwarranted privilege because it was inflated due to his abuse of sick time. The OTSC alleges that Lincoln repeatedly used both of his public positions as a BPD officer and as the PCSD Director of Security to obtain these unwarranted sick leave pay benefits, which enabled him to hold both positions and secure unwarranted retirement benefits.

By Briefing Order dated August 1, 2008, the Commission Chairman, at the request of the full Commission, directed the parties to brief the question whether, by engaging in the conduct alleged in the OTSC, a municipal or county employee "uses or attempts to use his official position" within the meaning of G.L. c. 268A, section 23(b)(2). Because we conclude that this question must be answered in the negative, we terminate this adjudicatory proceeding.

There are a variety of ways in which a public employee may use or attempt to use his official position in violation of section 23(b)(2). A public employee "uses or attempts to use" her official position in violation of the statute when she accepts a gift or gratuity of substantial value given to her because of her position. *See Ethics Primer, Receiving Gifts and Gratuities, available at www.mass.gov/ethics/primer_3_1.html.* A public employee "uses or attempts to use his official position" in violation of the statute when he invokes his official status to obtain an unwarranted privilege, for example by explicitly referring to public employment or title to get special treatment. *See In Re Smith*, 2008 SEC 2152, Decision and Order dated August 18, 2008; *In Re Clancy*, 2000 SEC 983. A public employee also "uses or attempts to use his official position" when he exercises his official authority to obtain some benefit, for instance by recommending that his agency hire his children, *In Re Cassidy*, 1988 SEC 371, or fixing a speeding ticket for a friend, *In Re Cibley*, 1989 SEC 422.

The allegation here is that respondent repeatedly and falsely called in sick to his two employers, thereby obtaining sick leave so that he could work both jobs. Sick leave was a benefit available to Lincoln in his positions as BPD lieutenant and PCSD Director of Security; he did not "use or attempt to use" his positions to get this benefit. He did not invoke his positions as Lieutenant and Director to get sick leave. Nor did he exercise his official authority to obtain sick leave. If the allegation is correct, he simply lied about being sick.

Generic public employee dishonesty, standing alone, does not amount to a use or attempted use of official position in violation of section 23(b)(2). More is required. A public employee in a position of trust who abuses that position to triple his vacation benefits beyond what he knows his entitlement to be violates section 23(b)(2). *In Re Buonopane*, 2006 SEC 2040. Similarly, a public employee who submitted a false claim for sick time and then used the powers of her position to prevent scrutiny of that claim would violate the statute. And, as indicated above, accepting gifts given because of one's official position, and invoking one's official position or exercising official powers to obtain a benefit, are all statutory violations.

Ordinary time and attendance fraud, absent any additional aspects, including those described above, does not amount to a use of official position in violation of the conflict of interest law. Such matters are best dealt with by employers through disciplinary or other employment-related action, not as violations of the conflict of interest law.

In summary, on review of the memoranda of the parties, we find that this adjudicatory proceeding should be, and hereby is, TERMINATED.

DATE AUTHORIZED: October 17, 2008
DATE ISSUED: November 4, 2008

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0019

IN THE MATTER OF
MARK WEISSMAN

DISPOSITION AGREEMENT

The State Ethics Commission and Mark Weissman 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, section 4(j).

On November 15, 2007, the Commission initiated, pursuant to G.L. c. 268B, section 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Weissman. The Commission has concluded its inquiry and, on April 17, 2008, found reasonable cause to believe that Weissman violated G.L. c. 268A.

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

Findings of Fact

1. Weissman has served as an unpaid member of the Massachusetts Marine Fisheries Advisory Commission ("MFC")[1] since he was appointed by the Governor in 1993. In his private capacity, Weissman is a retired publisher and statistician. He is also a former businessman and science textbook editor.

2. In 2001, Cape Wind Associates proposed to construct an alternative energy "wind farm" consisting of approximately 130 wind turbines in Nantucket Sound. In preparation for construction of the Cape Wind project ("the Project"), Cape Wind Associates sought numerous permits and approvals from state and federal authorities.

3. The Alliance to Protect Nantucket Sound ("the Alliance") is a non-profit environmental organization dedicated to the long-term preservation of Nantucket Sound. The Alliance was formed in 2001 and has been the central opponent of the Project.

4. Federal agencies have regulatory authority for most aspects of the Project because the proposed site for the Project is in federal waters. However, because the underwater electrical cable and power grid connections are within their jurisdictions, state and regional entities have regulatory authority over a portion of the Project.

5. The United States Army Corps of Engineers ("the Army Corps") initially led the National Environmental Policy Act ("NEPA") review[2] for the Project. The review was conducted jointly with the Massachusetts Environmental Policy Act[3] ("MEPA") Office and the Cape Cod Commission.[4] The joint environmental review process involved several public comment hearings and the publication of consolidated reports coordinated among the three agencies.

6. At an MFC meeting in August 2002, Weissman proposed that the MFC send a comment letter to the Army Corps regarding the Project. After a motion was made to accept the proposal, the MFC approved the motion unanimously. In a letter to the Army Corps dated August 15, 2002, the MFC expressed "dismay regarding the near exclusion of the Massachusetts Division of Marine Fisheries from the joint EIR/EIS scoping process."[5] The letter also stated several objections to the Project, based on its likely effect on fish populations.

7. In 2003, Weissman began providing paid consultant services to the Alliance. That year, the Alliance paid Weissman approximately $6,750, a portion of which was payment for Weissman's expert testimony before the Massachusetts Energy Facilities Siting Board ("the Siting Board").[6] In June 2003, Weissman testified in opposition to Cape Wind Associates' petition for approval to construct and operate electrical transmission lines from the proposed wind farm to an onshore power facility. During his testimony, Weissman raised several issues regarding potential effects of the Project on area fish populations, which were the same issues raised in the August 15, 2002 letter to the Army Corps of Engineers from MFC, which letter predated Weissman's employment by the Alliance.[7]

8. At an MFC meeting in October 2004, Weissman made a motion for the MFC to send letters to the Atlantic States Marine Fisheries Commission[8] ("ASMFC") and the New England Fisheries Management Council[9] ("NEFMC") requesting formal review of the Army Corps' Draft Environmental Impact Statement ("DEIS") upon its release. The motion carried unanimously and letters were sent over the MFC chairman's signature on October 25, 2004. The letters expressed concerns regarding the sufficiency of data provided by Cape Wind Associates to the Army Corps and requested that the ASMFC and NEFMC conduct evaluations to assess the Project's potential negative impacts.

9. In November 2004, the Army Corps released a 3,800-page DEIS that addressed federal, state, and regional environmental issues. The preliminary conclusion of the document was that the environmental, public health, and economic benefits of the Project would exceed the minor short-term

environmental costs. According to Weissman, the DEIS was criticized by the EPA and the Department of the Interior.

10. In December 2004, the Army Corps and the MEPA Office held a joint public hearing on the DEIS at the Massachusetts Institute of Technology campus in Cambridge, Massachusetts. Weissman and MFC chairman Mark Amorello testified at the hearing. Both introduced themselves as MFC members and stated their opposition to the Project. Weissman characterized the DEIS as "materially deficient" and voiced skepticism regarding the data used to determine the impact on fish populations. He also suggested alternate methods and data that he believed were more reliable than those used in the DEIS.

11. In January 2005, the Alliance paid Weissman $3,637, a portion of which was payment for Weissman's meetings and phone calls relating to reviews of the DEIS and his drafting 25 pages of DEIS comments, which were based in large part on materials provided by the statisticians of the Division of Marine Fisheries, according to Weissman.

12. In February 2005, the Cape Cod Commission held a public hearing on the DEIS at a middle school in Yarmouth, Massachusetts. Weissman introduced himself as an MFC member and criticized the DEIS. He stated that a more detailed review was needed to address the report's deficiencies.

13. Also in February 2005, the Alliance submitted a response to the DEIS to the Army Corps, in which Weissman is recognized as one of the Alliance's experts.

14. Also in February 2005, the Alliance paid Weissman $1,200, a portion of which was payment for Weissman's review of DEIS comments provided by other entities.

15. In 2005, the federal government shifted federal responsibilities for the NEPA review from the Army Corps to the United States Department of the Interior's Minerals Management Service ("MMS"). MMS determined that a new DEIS was required and separated the state and federal reviews.

16. In February 2007, pursuant to the MEPA and local review processes, Cape Wind Associates submitted a Final Environmental Impact Report ("FEIR") to both the Massachusetts Executive Office of Environmental Affairs and the Cape Cod Commission.

17. At an MFC meeting in March 2007, Weissman updated members of the MFC on the Project permitting process. He commented on details of the Project, including the environmental impact from the construction of turbines in shallow water and the size of construction vessels.

18. Also in March 2007, Weissman testified at a Cape Cod Commission hearing regarding the FEIR. Weissman addressed the Commission during the time set aside for public officials and introduced himself as an MFC member. Weissman expressed concern over the project's impacts to marine resources and the Cape's fisheries. He also recommended that a supplemental FEIR be required, which the Massachusetts Division of Marine Fisheries also recommended, according to Weissman.

19. Also in March 2007, Secretary of Environmental Affairs Ian Bowles announced that the FEIR adequately complied with MEPA, concluding the state and local environmental review of the project. Federal review of the Project remains ongoing.

20. In September 2007, the Alliance paid Weissman $2,500, a portion of which was payment for Weissman's review of the FEIR.

21. In total since 2003, Weissman has received approximately $48,000 from the Alliance, approximately $8,000 of which has been in relation to the Alliance's efforts to oppose the Project. Of this $8,000, the Alliance has paid Weissman more than $2,000 for reviewing and formulating comments regarding joint environmental review documents published by the Army Corps, the MEPA Office, and/or the Cape Cod Commission.[10]

22. Weissman verbally discussed his consultant activities for the Alliance at MFC meetings.[11] However, at no time did Weissman make a written disclosure to the Governor, his appointing authority, of his paid consulting relationship with the Alliance.

23. As an unpaid member of the MFC, Weissman was at all times relevant a special state employee as defined by G.L. c. 268A s. 1(o)(1).

24. Section 4(a) of G.L. c. 268A prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from receiving or requesting compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter[12] in which the commonwealth or a state agency is a party or has a direct and substantial interest.

25. Section 4(a) applies less restrictively to special state employees. A special state employee is subject to s. 4(a) only in relation to a particular matter (a) in which he has at any time participated as a state employee or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving.

26. The environmental review process for the Project was a particular matter. The state had a direct and substantial interest in this particular matter.

27. Weissman participated as an MFC member in this particular matter by taking the following actions:

a. In August 2002, proposing that the MFC send a comment letter to the Army Corps regarding the MFC's exclusion from the NEPA scoping process;

b. in October 2004, moving that the MFC send letters to the ASMFC and to the NEFMC requesting formal review of the Army Corps' DEIS when released;

c. in December 2004, testifying about the DEIS at a joint public hearing of the Army Corps and the MEPA Office;

d. in February 2005, providing comments about the DEIS at a public hearing of the Cape Cod Commission; and

e. in March, 2007 providing comments about the FEIR at a public hearing of the Cape Cod Commission.

28. By so participating as a state employee in the particular matter, Weissman is subject to s. 4(a) in relation to the environmental review process for the Project.

29. Weissman received over $8,000 as compensation from the Alliance for his services in assisting the Alliance's opposition to the Project. As detailed above, more than $2,000 of this amount was in relation to the environmental review process for the Project.

30. Therefore, Weissman violated section 4(a).

31. According to Weissman, he believed that his actions were proper because the interests of the Alliance were aligned with those of the MFC with regard to the environmental review process for the project. Weissman acknowledges, however, that his receipt of compensation from the Alliance in relation to the environmental review process for the Project was not as provided by law for the proper discharge of his official duties as an MFC member.[13] In addition, Weissman believed his actions were proper because he thought that the environmental review process was not a particular matter before the MFC; and therefore, he could receive compensation from a private party in relation to that particular matter. He now acknowledges that he was mistaken in that belief.

32. 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 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.

33. Section 23(b)(3) further provides that it shall be unreasonable to so conclude if the public employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion.

34. As described in paragraph 27 above, Weissman repeatedly participated as an MFC member in matters of interest to the Alliance while he had a significant private

business relationship with the Alliance. Most of his participation as an MFC member in these matters occurred after the Alliance hired Weissman in 2003 to provide expert testimony in opposition to a Cape Wind Associates petition before the Siting Board. In addition, Weissman participated as an MFC member in these matters while he was paid a total of approximatel y $48,000 in exchange for consulting services that he provided to the Alliance. By so participating officially as an MFC member in matters of interest to the Alliance while having this private business relationship with the Alliance, Weissman acted in a manner which would cause a reasonable person, knowing all the relevant circumstances, to conclude that the Alliance can improperly influence the performance of his official duties.

35. According to Weissman, he believed that his discussions with MFC members and staff were sufficient to comply with the requirements of the conflict of interest law. However, Weissman acknowledges that because he did not make a written disclosure to the Governor, his appointing authority, of his paid consulting relationship with the Alliance, these discussions did not comply with the requirements of section 23(b)(3) and, therefore, were insufficient to cure his section 23(b)(3) violation.

36. Therefore, Weissman violated section 23(b)(3).

Resolution

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

(1) that Weissman pay to the Commission $2,500.00 as a civil penalty for violating G. L. c. 268A sections 4(a) and 23(b)(3); and

(2) that Weissman 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 1, 2008

---

[1] Pursuant to 322 CMR 1.00 et seq., the MFC has authority to regulate fishing methods and equipment; to establish catch size, species and number limits; and to issue fishing and aquaculture (fish farm) permits.

[2] 42 U.S.C. 4321 et seq., *The National Environmental Policy Act* (NEPA) requires federal agencies to prepare an Environmental Impact Statement (EIS) when considering actions that would have a significant impact on the environment.

[3] G.L. c. 30, sections 60-62H require state agencies to prepare an Environmental Impact Report (EIR) detailing the impact on the environment of all works, projects or activities conducted by them. Section 62G provides: "In the case of projects for which an environmental impact statement is required under the National Environmental Policy Act of 1969, draft and final federal environmental impact statements may be submitted in lieu of environmental impact reports."

[4] The Cape Cod Commission is a regional land use planning and regulatory agency created by an Act of the Massachusetts General Court and confirmed by Barnstable County voters. *See* Chapter 716 of the Acts of 1989, Chapter 2 of the Acts of 1990, and Barnstable County Ordinance 90-12.

[5] The "scoping process" is the initial step in the preparation of the EIS by a government agency. "As part of the scoping process the lead agency shall: Invite the participation of affected Federal, State, and local agencies…" *See* 40 CFR 1501.7. Scoping and public involvement may be satisfied by planning meetings, public hearings, and solicitations for comments.

[6] G.L. c. 164, s. 69H established the Energy Facilities Siting Board for the purpose of licensing the construction of major energy infrastructure in Massachusetts, including large power plants, electric transmission lines, natural gas pipelines and natural gas storage facilities.

[7] According to Weissman, he received no compensation from the Alliance whenever he spoke publicly regarding the Project.

[8] The ASMFC was formed by the 15 Atlantic coast states for the purpose of coordinating the conservation and management of fishery resources for sustainable use.

[9] 16 U.S.C. sections 1801-1884, *The Magnuson-Stevens Fishery Conservation and Management Act* establishes a U.S. exclusive economic zone between three and 200 miles offshore, and eight regional fishery councils to manage the living marine resources within that area. The NEFMC is one of these eight councils.

[10] The approximately $40,000 balance of payments was compensation for publishing the 2006 and 2007 Boater's Guides to Nantucket Sound, creating a water quality monitoring collaborative at UMass Dartmouth, and developing other Nantucket water quality projects.

[11] According to Weissman, the Director of Marine Fisheries and the Commissioner of Fish and Game attended these meetings.

[12] Section 1(k) of c. 268A defines "Particular matter" as "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."

[13] See *Edgartown v. State Ethics Commission*, 391 Mass. 83 (1984) (Public employee prohibited from representing private citizens for compensation because his duties do not include representing or receiving compensation from private citizens, even where the interests of his public agency and the private citizens are aligned.)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0020

IN THE MATTER OF
OLIMPIA PALAZZOLA

DISPOSITION AGREEMENT

The State Ethics Commission and Olimpia Palazzola 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, s. 4(j).

On September 21, 2007, the Commission initiated, pursuant to G.L. c. 268B, section 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Palazzola. The Commission has concluded its inquiry and, on April 17, 2008, found reasonable cause to believe that Palazzola violated G.L. c. 268A.

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

Findings of Fact

1. Palazzola was an elected member of the City of Gloucester School Committee from January 2006 to December 2007.

2. Palazzola's son, Keith, was a special education teacher at Gloucester High School ("GHS").

3. On April 9, 2007, upon his return to GHS after being out on an extended medical leave, Keith and his supervisor, Barbara Sachs, had a verbal confrontation.

4. Keith then called Palazzola (his mother), reported the altercation with Sachs, which he described as harassment, and asked Palazzola to come to the school.

5. At approximately 7:00 a.m., Palazzola arrived at GHS and met with Sachs. Palazzola repeated to Sachs what Keith had told her about his interaction with Sachs that morning. According to Palazzola, Sachs offered an explanation that was critical of Keith. Palazzola was not satisfied with the explanation, and she terminated the conversation. As Palazzola left that meeting, she said to Sachs, "The harassment has to stop."

6. On the same morning, GHS Principal Joseph Sullivan was scheduled to meet with Keith and Keith's union representative regarding a pending personnel matter.

7. When Palazzola, Keith, and Keith's union representative arrived at Sullivan's office, Sullivan told Palazzola that she could not attend the meeting because it was a personnel meeting and that the union represented Keith. Palazzola left the principal's office.

8. According to Palazzola, she then called Superintendent Christopher Farmer, who was not in. Assistant Superintendent Brian Tarr was in, and Palazzola asked him to come to GHS and attend the meeting, because Keith believed he was being harassed. When Palazzola saw Tarr, she explained to him what she believed to be the history of Keith being harassed. Tarr then went into the meeting.

9. While the meeting continued, Palazzola was able to reach Superintendent Farmer by phone and ask him to come to the meeting.

10. Palazzola did not attend the meeting.

11. After the meeting, Palazzola traveled to Superintendent Farmer's office and talked with both Farmer and Tarr. Palazzola explained that her son and others were being harassed by the GHS administration and asked

Farmer to look into this issue because she was worried about Keith's health. Farmer explained to Palazzola that the School Committee does not have a role in personnel matters involving teachers. This conversation lasted approximately one hour.

Conclusions of Law

12. As a member of the Gloucester School Committee, Palazzola was at all times relevant a municipal employee as defined by G.L. c. 268A s. 1(g).

Section 17(c)

13. 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 other than the municipality, in connection with any particular matter in which the same municipality is a party or has a direct and substantial interest.

14. Keith's harassment claim against the GHS administration was a particular matter.

15. The City of Gloucester had a direct and substantial interest in Keith's harassment claim against the GHS administration.

16. Palazzola acted as Keith's agent in connection with this particular matter by appearing at GHS on April 9, 2007, at Keith's request and confronting his supervisor Sachs prior to the GHS administration's meeting to discuss Keith's personnel issue and stating to her "The harassment has to stop"; and by meeting with Superintendent Farmer and Assistant Superintendent Tarr to discuss Keith's harassment claim against the GHS administration.

17. Therefore, Palazzola violated section 17(c).

Resolution

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

(1) that Palazzola pay to the Commission $2,000.00 as a civil penalty for violating G. L. c. 268A s. 17; and

(2) that Palazzola 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 16, 2008

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 08-0021

IN THE MATTER OF
ROBERT K. COUGHLIN

DISPOSITION AGREEMENT

The State Ethics Commission and Robert K. Coughlin 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, section 4(j).

On September 21, 2007, the Commission initiated, pursuant to G.L. c. 268B, section 4(a), a preliminary inquiry into possible violations by Coughlin of sections 6 and 23(b)(3) of G.L. c. 268A, the conflict of interest law. On June 19, 2008, the Commission amended its preliminary inquiry to include possible violations of G.L. c. 268A, section 23(b)(2). The Commission has concluded its inquiry and, on October 17, 2008, found reasonable cause to believe that Coughlin violated G.L. c. 268A, section 23(b)(3), and terminated the inquiry as to the remaining allegations.

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

Findings of Fact

1. From late January 2007 until August 31, 2007, Coughlin was Undersecretary for Business Development in the Executive Office of Housing and Economic Development ("EOHED"). As such, he was a state employee as that term is defined in G.L. c. 268A, section 1.

2. Coughlin's official duties as undersecretary included acting as an advocate in encouraging companies to stay and expand business in Massachusetts, and encouraging new companies to move here. Coughlin supervised six departments, including the Massachusetts Office of Business Development ("MOBD").

3. In 2007, MOBD assisted Massachusetts companies and companies considering relocating to Massachusetts in obtaining grants and loans from various state agencies, and in dealing with permitting issues at the state and local levels. In 2007, MOBD's Division of Life Sciences specialized in providing these services to the life sciences industry.

4. The Massachusetts Biotechnology Council, Inc. ("MBC") is an association of more than 550 dues-paying biotechnology companies, academic institutions and others involved in the biotechnology industry. One of the functions performed by MBC is to lobby on behalf of its members regarding issues of importance to its members that are under consideration by the legislative or executive branch of government.

5. During Coughlin's tenure as EOHED Undersecretary, MOBD had authority over or provided substantial input regarding several issues of importance to the MBC. One such issue was the $1 billion Life Sciences Initiative ("LSI") announced by the Governor on May 8, 2007, as to which legislation was filed on July 19, 2007. MOBD also sought to assist MBC-member companies to expand in or relocate to Massachusetts, as it did with other companies.

6. On January 9, 2007, the MBC presidency became vacant. In late January or early February, the MBC formed a seven-person Search Committee to find a new president. The Search Committee was assisted by the MBC senior staff and its Acting President and Chief Operating Officer. In addition, the Search Committee retained the services of a recruiting firm, Levin & Co. The key liaison from Levin & Co. was the firm's chairwoman ("Levin").

7. As of February 2007, Coughlin was regularly interacting with MBC senior staff on MBC business issues that fell within Coughlin's EOHED jurisdiction. On one of those occasions, in Coughlin's office in approximately February 2007, Coughlin indicated that he was interested in being considered for the MBC presidency. On March 27, 2007, at a Massachusetts Development Finance Agency open house, Coughlin again expressed to an MBC senior staff person his interest in being considered for the job, and on March 28, 2007, he agreed to have his name placed on a list of potential candidates being sent to Levin.

8. On April 1, 2007, Coughlin e-mailed his résumé to an MBC senior staff person, with the understanding it would be passed on to the Search Committee. Shortly thereafter, it was provided to the Search Committee.

9. On May 25, 2007, Coughlin met with Levin for more than an hour to discuss his interest in being considered for the job.

10. On June 11, 2007, Coughlin discussed the job with the MBC Search Committee Chair and with its Acting President for approximately an hour to an hour and a half.

11. On June 29, 2007, a Levin & Co. employee sent Coughlin an e-mail requesting that he hold the date of July 31, 2007, for a meeting with the Search Committee. On June 30, 2007, Coughlin e-mailed that Levin & Co. employee stating that he will "put a hold on the 31st" and requesting that he be made aware of the time of his interview "ASAP."

12. In mid-July, 2007, Coughlin consulted with private counsel concerning his interest in the position.[1] Following the consultation with counsel, Coughlin orally advised the Governor's staff of the scheduled MBC interview, and on July 24, 2007, filed two disclosure forms with the Commission, one captioned "Disclosure of Appearance of Conflict of Interest Required by G.L. c. 268A, section 23(b)(3)"[2] and the other captioned "Disclosure of

Financial Interest By A State or County Employee As Required By G.L. c. 268A, section 6, 13."[3] Both forms were provided to Coughlin's `appointing authority on July 24, 2007.

13. On July 31, 2007, the Search Committee interviewed Coughlin and three other finalists. The Committee then decided to offer the position to Coughlin.

In early August 2007, the MBC offered the job to Coughlin. On or about August 10, 2007, Coughlin accepted the offer. On September 4, 2007, Coughlin began serving as MBC's new president, with an annual salary of $350,000.

14. Coughlin acted as EOHED Undersecretary in matters in which the MBC had a significant interest while he was an applicant for the MBC presidency, including the following:

a. Between April 1, 2007, and July 2007, Coughlin met with MBC senior staff on at least a weekly basis to discuss economic development matters of interest to the MBC or its members;

b. On April 27, 2007, Coughlin attended a meeting with the Governor and MBC representatives and others regarding the Life Sciences Initiative;

c. On June 5, 2007, Coughlin chaired a meeting at the EOHED offices, attended by EOHED staff, MBC employees and MBC-member company representatives. The purpose of the meeting was to formulate tax proposals for the Life Sciences Initiative. MBC senior staff arranged and attended the meeting and sent drafts of tax proposals to Coughlin and his staff in advance of the meeting. At the meeting, Coughlin communicated a message as to additional proposals he would like submitted; and

d. On June 28, 2007, Coughlin had a meeting in his office with senior management of MBC-member company Cubist Pharmaceuticals ("Cubist") in which they discussed Cubist's proposals for the tax component of the LSI. MBC senior staff arranged and attended the meeting.

15. Consistent with ongoing meetings MOBD representatives had with biotechnology companies throughout the Commonwealth for economic development purposes, Coughlin and other MOBD representatives met with GTC Biotherapeutics ("GTC") representatives, including the GTC Chief Executive Office ("CEO"), at GTC's headquarters in Massachusetts on June 22, 2007. The meeting was arranged and attended by MBC senior staff and lasted approximately two hours.

The parties discussed GTC's interest in applying for financial and other support from EOHED through various programs. At that time, GTC's CEO was on the MBC Executive Committee and the MBC Search Committee for the presidency position and Coughlin knew that the CEO held those positions. Neither Coughlin nor any representative of GTC, including its CEO, discussed or mentioned the MBC presidency search or Coughlin's interest in the position before, during or after the meeting.

Conclusions of Law

16. Section 23(b)(3) of G.L. c. 268A, in relevant part, 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. The section further provides that it shall be unreasonable to so conclude if such state employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion.

17. By submitting his résumé for the MBC presidency on April 1, 2007, and subsequently repeatedly acting in his official capacity as EOHED Undersecretary in matters in which the MBC had a significant interest, Coughlin 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 MBC could unduly enjoy his favor in the performance of his official duties. In so acting, Coughlin repeatedly violated section 23(b)(3).

18. Coughlin could have avoided violating section 23(b)(3) by making a written disclosure of the relevant facts to his appointing authority before so acting. He did not do so until July 24, 2007, after he had repeatedly acted in his official capacity as just described above. Although Coughlin filed his disclosure with his appointing authority before the date of his interview with the full Search Committee and before he received the job offer, the filing occurred well after April 1, 2007, the date on which he had submitted his résumé to the MBC for consideration.

19. In addition, by submitting his résumé for the MBC presidency, and subsequently acting in his official capacity as EOHED Undersecretary in meeting with a senior official of an MBC-member company regarding that company's interests before the EOHED, while that official was on the MBC Presidency Search Committee, Coughlin 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 company could unduly enjoy his favor in the performance of his official duties. In so acting, Coughlin violated section 23(b)(3). Coughlin made no disclosure of these facts to his appointing authority.

20. To the extent any of the violations described above took place after Coughlin met with the head of the recruiting firm on May 25, 2007, or after he met with the Search Committee chair and MBC chief operating officer on June 11, 2007, the appearance of impropriety was exacerbated.

Resolution

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

(1) that Coughlin pay to the Commission the sum of $10,000 as a civil penalty for repeatedly violating G.L. c. 268A, section 23(b)(3); and

(2) that Coughlin 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 24, 2008

[1] According to Coughlin, in early May 2007, in a brief conversation in passing, he told his boss, the Secretary of the Executive Office of Housing and Economic Development, that he, Coughlin, was in the "wide net" of potential candidates for the MBC presidency. He did not disclose that he had already submitted his résumé to the MBC on April 1, 2007, nor did he later disclose to his boss his subsequent meeting with Levin or his meeting with the Search Committee chair and with the MBC Acting President.

[2] The disclosure states: I am interested in the vacant position as President of the Massachusetts Biotechnology Council, a membership organization whose members are intensely interested in life sciences. The financial well being of the organization is a function of the number of its members and the dues they pay. My duties as Undersecretary would ordinarily require me to advocate for passage of the Governor's Life Sciences Initiative and those considering me for the Presidency may have organizational and other interests in that legislation.

[3] That disclosure, as to the financial interest involved, states: "Massachusetts Biotechnology Council is a membership organization and its potential membership will be increased by passage of the Governor's Life Sciences Initiative."

ADVICE ◇ EDUCATION ◇ DISCLOSURE ◇ ENFORCEMENT

<u>COMMISSION MEMBERS</u>

E. George Daher, Chairman
Matthew N. Kane, Vice Chairman
Jeanne M. Kempthorne
David L. Veator
Hon. Patrick J. King (ret.)

MASSACHUSETTS STATE ETHICS COMMISSION
One Ashburton Place, Room 619
Boston, MA 02108
617-371-9505