

ADVICE



EDUCATION



DISCLOSURE



ENFORCEMENT

2013 Advisory Opinions Enforcement Actions

MASSACHUSETTS STATE ETHICS COMMISSION

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Included in this publication are:

State Ethics Commission Formal Advisory Opinion issued in 2013

Cite Conflict of Interest Law Formal Advisory Opinion as follows: *EC-COI-13-(number)*.

State Ethics Commission Advisories issued in 2013

Cite Conflict of Interest Advisories as follows: Advisory-13-(number).

State Ethics Commission Decisions and Orders and Disposition Agreements issued in 2013

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

In the Matter of John Doe, 2013 SEC (page number).

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

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Summary of Advisory Opinion Calendar Year 2013

EC-COI-13-1 –Section 7 of the conflict of interest law prohibits a state legislator from owning a 23% interest in a company that has two contracts with Massport, when those contracts were not competitively bid, and would prohibit the legislator, in the event he is elected Governor, from owning a 23% interest in a company that has two contracts with Massport, when those contracts were not made after public notice or competitively bid. There is no Section 7 exemption available to the legislator in his current position, nor is there an exemption that would be available to him if he became Governor. Consequently, to comply with the law, he must do one of the following: terminate the contracts with Massport; entirely and permanently divest his holdings in the company; or resign his current public office and discontinue his campaign for Governor.

[Note: A regulatory exemption pertinent to the issues discussed in this opinion was promulgated on January 31, 2014, 930 CMR 6.26.]

**CONFLICT OF INTEREST OPINION
EC-COI-13-1**

Facts:

A state legislator and candidate for Governor seeks advice with respect to how Section 7 of the conflict of interest law applies to him in his current and prospective positions, respectively. The legislator owns approximately 23% of Hyannis Air Service, Inc., d/b/a Cape Air (“Cape Air”), a regional airline which has two contracts with the Massachusetts Port Authority (“Massport”), the independent state authority that owns and operates Logan Airport. Cape Air’s two contracts with Massport include a Terminal Lease and an Operating Agreement. The Terminal Lease, executed April 4, 2003, between Cape Air and Massport, gives Cape Air the use of a portion of Terminal C, including gates, at Logan Airport, and requires Cape Air to pay annual rent and certain other charges for those premises according to a formula set forth therein. It is a month-to-month lease that continues until terminated by either Cape Air or Massport. The Operating Agreement, executed June 10, 2002, between Cape Air and Massport, permits Cape Air to provide air service at Logan Airport. It is a year-to-year agreement that extends automatically. The Operating Agreement requires Cape Air to pay specified fees to Massport. These contracts were not competitively bid, and were not made after public notice.

Questions:

- (1) May a state legislator own a 23% interest in a company that has two contracts with Massport, when those contracts were not competitively bid?
- (2) In the event he is elected Governor, may he own a 23% interest in a company that has two contracts with Massport, when those contracts were not made after public notice or competitively bid?

Answer:

In both cases, the answer is no. Both of these situations raise a substantial issue under Section 7 of c. 268A, which prohibits state employees from having financial interests in state contracts, unless an exemption applies. There is no Section 7 exemption available to the legislator in his current position, nor is there an exemption that would be available to him

if he became Governor. Consequently, to comply with the law, he must do one of the following: terminate the Cape Air contracts with Massport; entirely and permanently divest his holdings in Cape Air; or resign his current public office and discontinue his campaign for Governor.

Analysis:

Section 7 provides that a state employee may not knowingly have a financial interest, directly or indirectly, in a state contract, unless there is an applicable exemption. Cape Air has contracts with Massport under which it must pay rent and various charges and fees to Massport. Cape Air has a financial interest in those contracts. Therefore, the legislator, as the owner of at least 23% of Cape Air, has an indirect financial interest in those contracts for purposes of Section 7.

We most recently considered the application of Section 7 to a legislator’s financial interest in a state contract in 2011 in *EC-COI-11-1*. That opinion involved a state legislator who was the 100% owner of a small family business that had a contract with a state agency under which it provided certain services. The company had supplied such services to the agency for at least 30 years. The contract was a standard form contract and the terms were not individually negotiable. The contract was due to terminate in several months. We stated that, even though the evils aimed at by Section 7 – use of position by state employees to obtain contractual benefits, and public perception that state employees have an “inside track” to such opportunities – were not present, the legislator would have to divest himself of that contractual interest.

In earlier opinions involving state legislators and Section 7, we have consistently required them to divest their financial interests in state contracts, even where the financial interest pre-dated election to the General Court, or to avoid initiating such financial interests:

- *EC-COI-95-9*: legislator employed as loan officer had a prohibited indirect financial interest in contracts between state agencies and housing lenders, where legislator would be paid a commission on loans he closed; Commission stated that legislator was prohibited from receiving such commissions. Commission cited its own prior precedent, *EC-COI-83-13*, holding that Section 7 applies even to contracts pre-dating state employment.

- *EC-COI-91-14*: legislator not allowed to be majority stockholder in consulting company that would do business with state; Commission noted that Section 7(c) “does permit certain exemptions for members of the General Court who own less than 10% of the stock of a corporation,” but “In light of your proposed ownership interest in the Company [at least 28%], however, you would not be eligible for this de minimis exemption.”
- *EC-COI-90-17*: legislator who owned specialty business not permitted to provide service under a subcontract to a company which was doing work under a state contract.
- *EC-COI-89-31*: legislator wanted to be of counsel to law firm; not permitted to consult for, or to represent, state agencies.
- *EC-COI-89-14*: legislator owned part of a general partnership, which owned certain property; legislator not permitted to transfer interest in property to third party for purpose of sale to state agency. The only exemption available under Section 7 would be divestment of all but 10% of legislator’s interest in general partnership, based on currently appraised value of partnership, as determined by independent appraiser.
- *EC-COI-89-9*: legislator who owned pest control company with wife required to divest financial interest in contract with state agencies.
- *EC-COI-84-108*: legislator who was also an attorney and wished to serve on state medical malpractice tribunal could not be compensated to do so.
- *EC-COI-81-189*: legislator was a partner in realty trust which owned several rental properties, two rental units of which received rental housing authority subsidies; his receipt of such subsidies was a prohibited financial interest in a state contract.
- *EC-COI-80-78*: candidate for General Court who was president and owner of 1/3 of stock of family-owned corporation would have to terminate or dispose of his financial

interest in corporation’s service contracts with state agencies within 30 days of being elected.

A state employee, including a state legislator, may comply with Section 7 by transferring a prohibited financial interest in a state contract irrevocably and in its entirety to someone else, including to his or her spouse or other immediate family member. We closely examine such transfers to immediate family, including interspousal transfers, “to determine whether the state employee has truly transferred all right and title to the interest and any benefit that might flow from it, or whether the purported transfer is merely ‘a contrivance to evade the reach of the conflict of interest laws.’” *EC-COI-95-8, 89-14, 89-9*. Among the factors that we have considered in determining whether there has been a relinquishment of a prohibited financial interest are (1) the consideration paid by the transferee, (2) whether the state employee’s initial investment has been liquidated, (3) whether the state employee continues to own the property transferred, and (4) whether the state employee continues to participate in the management and control of the business, such that it can fairly be said that he continues to deal with the property as his own. *EC-COI-95-8*. If the state employee genuinely and irrevocably relinquishes all right, title, and interest in a property and ceases to deal with it as his own, then, even if the transfer is to an immediate family member, we will not attribute to the state employee his immediate family member’s financial interest. In that situation, no exemption from Section 7 is required because the state employee does not have a financial interest in a state contract.

Absent either termination of Cape Air’s contracts with Massport, or complete and irrevocable divestment of the legislator’s ownership interest in Cape Air as just described, the legislator can only continue to have an indirect financial interest in the Massport contracts if there is an available exemption to Section 7. There is only one relevant exemption potentially available to members of the General Court. Under Section 7(c), a legislator may have a financial interest in “a contract made by an agency other than the general court or either branch thereof, if his direct and indirect interests and those of his immediate family in the corporation or other commercial entity with which the contract is made do not in the aggregate amount to ten per cent of the total proprietary interests therein, and the contract is made through competitive bidding and he files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family.”

The language of the Section 7(c) exemption has not been changed in any relevant respect since 1962, when the conflict of interest law was first enacted.¹ The April 1962 “Final Report of the Special Commission Established To Make An Investigation Of An Act Establishing A Code Of Ethics To Guide Employees and Officials Of The Commonwealth In the Performance Of Their Duties” described the effect of what is now Section 7 and its original exemptions as follows: “In summary, no state employee may contract with his own agency, and general officers and employees and members of the General Court may contract only in areas outside their official responsibilities, through open and competitive bidding, and where their interest is proportionately small in relation to the transaction involved.” Thus, the Section 7(c) exemption expresses a legislative intent, which has existed since the enactment of the conflict of interest law, that the exemption available to state legislators be more limited than those generally available to state employees. In fact, the exemption for legislators is notably stricter in that it also takes into consideration the financial interests of legislators’ immediate family. That is, a legislator cannot meet the Section 7(c) exemption’s limitation on the amount of ownership by retaining a less than 10% ownership interest and transferring the rest of his interest to immediate family, if, together, his and his immediate family’s ownership interests equal 10% or more.

Here, the legislator cannot satisfy the requirements of the Section 7(c) exemption because (1) he owns 10% or more of Cape Air; and (2) Massport’s terminal leases and operating agreements are not arrived at through a competitive bidding process. Because both requirements of Section 7 cannot be satisfied, it is not an option for the legislator to divest himself of a portion of the interest he has in Cape Air to bring his ownership interest under 10%; since contracts of these types are not competitively bid by Massport, the Section 7(c) exemption would not be available even if he did so divest. Also, because the Section 7(c) exemption is available only where the aggregate interest of the legislator and his family is less than 10% of the corporation, he also cannot resolve the issue by retaining less than 10% ownership and giving the remainder of his interest to his spouse and/or children. Therefore, the legislator’s choices are the following: to terminate Cape Air’s contracts with Massport; to divest himself entirely of his interest in Cape Air – including through a bona fide and irrevocable transfer of his entire ownership interest to his immediate family members, as discussed above; or to resign his current position.

The situation would not improve with respect to Section 7 if the legislator were elected Governor. If that were the case, the only potentially available exemption would be Section 7(b), not 7(c). The Section 7(b) exemption² requires, among other things, that the contract in which the state employee has a financial interest have been made “after public notice or where applicable, through competitive bidding.” Because Cape Air’s contracts with Massport do not satisfy that requirement, he cannot meet the requirements of the Section 7(b) exemption, and therefore, would not be able to serve as Governor and still retain his interest in Cape Air.³

Conclusion:

Under the law, unless Cape Air’s contracts with Massport are terminated, the legislator must choose between his public office and retaining his financial interest in Cape Air. Section 7(a) requires that this be done within 30 days of learning one is in violation of Section 7. In the context of a request for advice from the Commission, we have construed this as meaning within 30 days of receipt of our response to such a request. Under these circumstances, and similar to our approach in *EC-COI-11-1*, we will consider providing a reasonable time extension for compliance, if requested. If the legislator chooses to retain his current position and dispose of his entire ownership interest through a transfer to his immediate family, such transfer will need to satisfy the requirement that he entirely and irrevocably relinquish his financial interest in Cape Air. Useful guidance may be found in *EC-COI-89-9*, which involved an attempt by a newly elected member of the General Court to comply with Section 7 by turning over to his wife a business with state contracts. In that opinion, we found that the legislator retained a financial interest in the company, because (1) no money passed hands in his transfer of the business to his wife; (2) his initial investment in the company was not liquidated; (3) he continued to participate in the management and control of the company; and (4) he continued to own the property from which the business operated. Any transfer by the legislator to a family member of his interest in Cape Air to comply with Section 7 would have to be a bona fide and irrevocable transfer that satisfied this standard.

Date authorized: August 2, 2013

¹ The only change that has been made to the wording of Section 7(c) is that, as originally enacted, the

required disclosure was to be made to the State Secretary; the Commission was substituted for the Secretary in 1978, when it was created.

² Under Section 7(b), a state employee other than a state legislator and “who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency” may have a financial interest in a state contract, “if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee’s regular duties, the employee is compensated for not more than five hundred hours during a calendar year; and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.”

³ Under these facts, there are additional impediments to meeting the requirements of the Section 7(b) exemption.

**ADVISORY 13-1: MAKING AND RECEIVING
RECOMMENDATIONS
FOR PUBLIC OR PRIVATE EMPLOYMENT**

The Ethics Commission is required by statute, G.L. c. 268B, § 3(g), to provide advice to those who request it on how the conflict of interest law, G.L. c. 268A, applies to their future conduct. In addition to providing individualized advice, from time to time, the Commission issues Advisories to provide general advice on discrete topics to as many people as possible. This Advisory provides the Commission’s best guidance on how public employees may comply with the conflict of interest law when they make and receive recommendations for public or private employment. A public employee who follows the guidance in this Advisory will not violate the conflict of interest law and will not be prosecuted by the Commission. A public employee who chooses not to follow the guidance in this Advisory will not automatically violate the law, but, in such instances, the Commission may need to determine whether a violation has occurred based on the specific facts.

I. *Recommendations by Appointed Public Employees*

Under c. 268A, § 23(b)(2), public employees may not knowingly use their official positions to give or attempt to give anyone an unwarranted privilege of substantial value,¹ which is not properly available to similarly situated individuals. An appointed public employee who is authorized by her public agency to make recommendations does not violate § 23(b)(2) by using her public position to recommend for employment a person who currently works with her at that public agency, or who has worked with her in the past at that public agency, or with whom she has had professional dealings in her current public position; provided that she has reason to believe, based on those contacts, that the job applicant is qualified for the position for which he is applying. The public employee may sign the recommendation using her public title, and the recommendation may be on official agency letterhead, as long as her knowledge of the job applicant’s qualifications arises from her employment with her current public employer as described above. The recommendation should be based on the public employee’s personal knowledge of the job applicant’s work performance and ability, may not be accompanied by pressure (see Section III below), and may not be directed at an employer prohibited from receiving public employee recommendations under G.L. c. 271, § 40 (see Section V below).

If an appointed public employee is asked to recommend someone whom he knows from somewhere other than his current public position, he may do so only in his private capacity. In general, except for judges, as discussed below, an appointed public employee may not use his current official title or official letterhead to recommend persons whom he knows from some context other than his current official position, because it is not part of his current public duties to recommend such persons. However, the public employee may send, in his private capacity, and without using his public title, letterhead, telephone or email, a private letter stating his personal recommendation. The public employee may refer to his prior position and title in a private letter of recommendation to explain how he knows the former co-worker. In certain limited circumstances, the public employee may refer to his current position and title in the body of the private letter, if his current position is relevant to some substantive aspect of the recommendation.

Judges subject to the Code of Judicial Conduct, Supreme Judicial Court Rule 3:09, may participate in their official capacity in the process of judicial

selection by writing letters of recommendation and providing comments and testimony in support of applicants and nominees for judicial office without violating the conflict of interest law. A judge who participates in a judicial selection process by written or oral communications on behalf of an applicant or nominee pursuant to Rule 3:09, Canon 2B, is not providing the applicant or nominee with an “unwarranted” privilege, because conduct explicitly authorized by statute or regulation is not “unwarranted” for purposes of the conflict of interest law, *EC-COI-12-1*. The Rules of the Supreme Judicial Court are comparable to regulations for these purposes. Accordingly, a judge may use his or her official title and letterhead to recommend an applicant or nominee for judicial office (including the position of clerk-magistrate) of whom the judge has personal knowledge, and may do so based on familiarity with the applicant or nominee acquired before or while the judge held his or her current public position.

II. *Recommendations by Elected Public Employees*

An elected public employee may use his public position to recommend for employment a person who is a current or former employee of the elected public employee in the office in which he is currently serving, or a person whose qualifications for employment the elected public employee learned in the course of his current public duties, provided that the elected public employee has reason to believe, based on those contacts, that the job applicant is qualified for the position for which he is applying.

Recommendations of Constituents

Elected public employees may also use their public positions to recommend their constituents. “Constituent” is not defined in the General Laws, nor is it defined in Commission precedent. Because elected public employees may have responsibilities to Commonwealth residents outside their specific districts, for purposes of the conflict of interest law, the Commission will consider an elected public employee’s constituents to be any person residing in the Commonwealth, whether or not they reside in the elected public employee’s specific district, county, or city or town. As with any other official action by an elected public employee, recommending a constituent for employment is subject to the conflict of interest law.

To comply with the prohibition against giving unwarranted privileges imposed by § 23(b)(2), an

elected public employee should have some reason to believe that the constituent possesses the minimum qualifications for the position for which he is being recommended. The elected public employee may already be familiar with the constituent’s qualifications for the desired position. If not, the elected public employee should obtain sufficient information to satisfy himself that the constituent possesses the minimum qualifications for the position before making the recommendation. While the elected public employee is not required to interview a constituent before recommending him, the elected public employee should ascertain whether the constituent has the minimum qualifications for the position sought. An elected public employee may accomplish this by requiring any constituent seeking an employment recommendation to provide the job posting for the position sought, if one exists, and his resume, and then comparing them to determine whether the constituent meets the minimum qualifications for the position. If no job posting exists, the elected public employee should use her best judgment to determine whether the constituent meets the minimum qualifications based on the description of the position provided by the constituent and any other publicly available information.

Section 23(b)(2) prohibits public employees from knowingly providing or attempting to provide a benefit of substantial value selectively to a single individual, or to a discrete group.² In considering whether prohibited special treatment has been provided selectively, the Commission will consider whether the elected public employee has a standard practice for handling requests for recommendations from his constituents, and, if so, whether that standard practice was followed in the particular instance. Such a process should include: taking reasonable steps to determine whether the constituent has the minimum qualifications for the position, as just described; making clear in the recommendation the information on which the recommendation is based, and not going beyond that information in making the recommendation; providing the same opportunity to obtain a recommendation to any other constituent requesting one; not putting pressure on the potential employer, directly or indirectly, or personally or through others; and not making recommendations prohibited by G.L. c. 271, § 40.

The conflict of interest law does not require elected public employees to recommend, nor does it prohibit them from recommending, their constituents; it only prohibits providing recommendations selectively to some constituents, but not to others who are similarly

situated. An elected public employee may choose to limit the recommendations he provides as long as those limitations are consistent for similarly situated individuals. For example, an elected public employee would not violate the conflict of interest law by declining to make constituent recommendations at all, and instead adopting a practice of using her official title and letterhead only when she is recommending persons who have worked for her, or with whom she has worked, in her current public position, and making all other recommendations only in her personal capacity, without official title or letterhead. Alternatively, an elected public employee could choose to limit her constituent recommendations only to persons residing in her district without violating the conflict of interest law, provided that, in making such constituent recommendations, she observes a standard practice for handling such requests as just described.

The conflict of interest law also does not require an elected public employee to recommend, nor does it prohibit him from recommending, multiple applicants for an available position. An elected public employee may include as part of his or her standard process for handling constituent requests for recommendations a consistent practice of recommending only the first constituent who asks to be recommended, or the strongest candidate out of multiple candidates, and declining to provide recommendations for others seeking to be recommended for that same position.

Recommendations can and should reflect the public employee's degree of familiarity with, and knowledge of, the person being recommended. Section 23(b)(2) of the conflict of interest law does not require an elected public employee to disregard information he knows about a constituent that is pertinent to whether the person is qualified for a position, or to recommend the person even though, for example, he knows or has learned that the constituent has a history of poor job attendance. An elected public employee may decline to recommend a constituent who meets the paper qualifications for a position, when there is some objective, job-related reason for doing so. Similarly, an elected public employee will not violate § 23(b)(2) of the conflict of interest law by writing a lengthy, detailed recommendation on behalf of a former member of her staff with whose qualifications she is personally familiar, and a less detailed recommendation on behalf of a constituent whom she has determined possesses the qualifications for the job, but about whom she knows much less than she does about her former staffer. Writing recommendations that

accurately reflect what an elected public employee knows or has been able to determine about a candidate for employment does not give anyone an unwarranted privilege in violation of Section 23(b)(2) of the conflict of interest law, as long as the elected public employee has determined that the candidate for employment meets the minimum qualifications for the position.

Immediate Family Members

An elected public employee may not use his position to recommend his immediate family member³, pursuant to the sections of the conflict of interest law that prohibit all public employees, elected or appointed, from participating in any particular matter in which an immediate family member has a financial interest.⁴ Because a job applicant has a financial interest in employment, elected public employees may not participate in their official capacities in any hiring process in which an immediate family member seeks employment. An elected public employee is considered to "participate" in his official capacity in any matter into which he interjects himself in his official role.⁵ Accordingly, an elected public employee who recommends an immediate family member for employment is participating in the hiring process in violation of the conflict of interest law.⁶

Appearance of a Conflict of Interest

Section 23(b)(3) of the conflict of interest law prohibits all public employees, elected or appointed, from acting in a manner that would create the appearance of a conflict of interest. Specifically, it prohibits acting in a manner that would cause a reasonable person who knew the facts to conclude that anyone can improperly influence the public employee or unduly enjoy his favor, or that the public employee is likely to act or fail to act as a result of kinship, rank, position, or undue influence. The same section further provides that such an appearance of a conflict of interest will be dispelled if the public employee makes a public disclosure of the facts prior to acting.

An elected public employee's recommendation of a constituent with whom the public employee has no other relationship, pursuant to the elected public employee's standard practice for constituent recommendations, will not create an appearance of a conflict of interest pursuant to § 23(b)(3). However, a recommendation of a constituent who is also a personal friend, non-immediate family member, business associate, or someone with whom the elected public employee has some other comparable

additional relationship, can create such an appearance. In these situations, assuming that the elected public employee has not provided any preferential treatment because of the relationship and has not applied any direct or indirect pressure in making the recommendation, the elected public employee can avoid a violation of the conflict of interest law by making a prior public disclosure of the facts to eliminate any appearance of a conflict, pursuant to § 23(b)(3).⁷ While we recognize that job applicants may be reluctant to have the fact that they are applying for a job publicly disclosed, in some circumstances a disclosure is needed to dispel the appearance of a conflict of interest, and protect the elected public employee from a violation of § 23(b)(3). If making a public disclosure is not a feasible option, then the elected public employee may only make the recommendation in his private capacity, without use of title, official letterhead or public resources.

III. *Recommendations Accompanied by Pressure Are Prohibited*

A recommendation will violate § 23(b)(2) if it is accompanied by pressure. Use of one's official position to exert pressure, directly or indirectly, on another to obtain or attempt to obtain employment for anyone is use of one's official position to secure an unwarranted privilege of substantial value in violation of § 23(b)(2).⁸ Whether pressure has been applied in a given situation is fact-intensive, and the Commission will examine all of the circumstances to make that determination. In past cases, the Commission has found prohibited pressure where a public employee made a request to a person or entity with significant pending or anticipated business before the public employee, the request was made during a meeting to discuss the pending business, and the public employee expressly linked the outcome of the pending business to favorable consideration of his request. The Commission has also found pressure where a public employee made repeated requests and made reference to the public employee's power over the recipient of the request. *In Re Travis*, 2001 SEC 1014; *In Re Pezzella*, 1991 SEC 526, 528; *In Re Galewski*, 1991 SEC 504, 505; *In Re Zeppieri*, 1990 SEC 448, 449; *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), *aff'g In Re Craven*, 1980 SEC 17.

While pressure in violation of § 23(b)(2) typically is applied through the spoken word, and far less frequently through the written word,⁹ this does not mean that the law prohibits oral recommendations, and permits only written recommendations. The law

prohibits pressure. An oral recommendation unaccompanied by explicit or implicit pressure is permissible. A written recommendation amounting to or accompanied by pressure is impermissible. Written recommendations unaccompanied by any oral contact do have an obvious advantage in that they do not require determinations as to what was said or how it was said. A person making an oral recommendation should therefore proceed with caution, since there will be no objective evidence of what she said or how she said it. The risk involved in making an oral recommendation is that the recipient of the oral recommendation may perceive it as pressure. If the Commission determines, based on the evidence, that a reasonable person would have so perceived it, the Commission may find a violation.

In determining whether a public employee's oral or written recommendation is consistent with the conflict of interest law, the Commission will consider all the circumstances to determine whether the recommendation was accompanied by pressure, in violation of § 23(b)(2) of the conflict of interest law. In addition to whether a recommendation was made in the context of other pending business, repeatedly, or with reference to the recommender's authority over the person receiving the recommendation, other factors to be considered may include, but are not limited to, the following:

- Did the public employee knowingly suggest, directly or indirectly, that factors other than the merits of the applicant and competing applicants for the position should be considered in making the hiring decision?
- Did the public employee knowingly suggest, directly or indirectly, that normal agency hiring procedures should be ignored or bypassed?
- Did the public employee knowingly recommend an individual for employment for a position that was not vacant or for a position that had not yet been created?
- How many contacts did the public employee have with the hiring agency? Weekly calls to the head of a hiring agency to "check the status" of a recommendation may amount to what a reasonable person would consider pressure, while a single call to the agency's

human resources office to find out whether a recommendation was received would not.

- Did a staff member or employee of the public employee, or anyone else acting on behalf of the public employee, knowingly take any action with respect to a recommendation that the public employee himself would not be permitted to take? A public employee may not circumvent the conflict of interest law by directing or knowingly permitting others to do what he may not.
- If an employment recommendation was discussed between a public employee making a recommendation and the recipient of the recommendation, and the two have other pending business between them, who brought up the topic of the recommendation? If the topic was voluntarily brought up by the recommendation recipient in the context of a meeting to discuss some other pending business, and the public employee making the employment recommendation made no attempt to link the outcome of the recommendation to any aspect of the other business, the conversation will not be considered pressure, absent some other evidence that pressure was applied.
- If a public employee who has recommended someone for employment is contacted by the hiring employer for a reference check, and, during that conversation, does not attempt to link the outcome of the employment application to any aspect of any other business he has pending with the hiring employer, that conversation will not be considered pressure, absent some other indication that pressure was applied.
- What are the relative positions of the public employee making the employment recommendation and the person receiving the recommendation? If they stand on an equal footing, then it is unlikely that the situation will be found to involve pressure.

IV. *Receiving Employment Recommendations*

The sections of the conflict of interest law already discussed in this Advisory also apply to public employees receiving employment recommendations. Just as § 23(b)(2) of the conflict of interest law prohibits providing a benefit selectively to a single individual, or to a discrete group, in the context of

making recommendations, it also prohibits such treatment by those who receive recommendations.

State law, specifically G.L. c. 66, § 3A, defines the process by which all recommendations for public employment in the Commonwealth must be handled as follows:

Recommendations for employment submitted in support of candidates applying for employment by the commonwealth, or any political subdivision of the commonwealth, shall not be considered by a hiring authority until the applicant has met all other qualifications and requirements for the position to be filled; provided, however, that a hiring authority may, in accordance with said agency's regular practice for conducting reference checks, contact and speak with a reference provided to it by a candidate for employment, or contact and speak with any person who has submitted a written recommendation on behalf of a candidate for employment with said agency.¹⁰

A public employee who knowingly gives an employment applicant preferential treatment in violation of G.L. c. 66, § 3A by, for example, putting an applicant on the list of "finalists" based on an employment recommendation, even though the candidate has not met all the other qualifications for the position, violates § 23(b)(2) of the conflict of interest law, because the public employee has given the applicant an unwarranted privilege of substantial value.¹¹

Furthermore, as explained above, public employees may not knowingly participate in any hiring process in which an immediate family member seeks employment. This means that an appointed public employee whose immediate family member is an applicant for a job in the public employee's agency may not review resumes to select applicants to interview, participate in the interview process, participate in choosing the finalists or the successful candidate, or participate in the hiring process in any other way (the only exception to this prohibition is if the appointed public employee fully discloses the facts in advance to his or her appointing authority and obtains the appointing authority's advance, written permission to participate, pursuant to §§ 6, 13, or 19 of the conflict of interest law). Moreover, to comply with the law, it is not sufficient merely to refrain from reviewing the immediate family member's resume or conducting her interview; the public employee must stay out of the hiring process

altogether, and must not take any actions concerning other, competing applicants for the position.

Finally, participating in a hiring process by knowingly acting on a recommendation, or in any other manner, when a personal friend, relative who is not an immediate family member, business associate, or someone else with whom the public employee has a comparable private relationship, is one of the applicants, will raise an appearance of a conflict of interest under § 23(b)(3) of the conflict of interest law. A public employee may satisfy § 23(b)(3) of the conflict of interest law by filing a written disclosure before participating in a hiring process that involves a personal friend, business associate, non-immediate family member, or person with whom he has a comparable private relationship, as long as he is able to act fairly and objectively in performing his public duties.

V. *Some Employers May Not Receive Recommendations from Public Employees*

In addition to the conflict of interest law restrictions discussed above, a separate statute provides that some employers are “off-limits” for employment recommendations by public employees. Most public employees are expressly prohibited from recommending anyone for employment by any public service corporation, specifically including any “railroad, street railway, electric light, gas, telegraph, telephone, water or steamboat company,”¹² or any “licensee conducting a horse or dog racing meeting” pursuant to G.L. c. 128A. G.L. c. 271, § 40. A recommendation knowingly made in violation of G.L. c. 271, § 40, or any other statute, gives the person recommended an unwarranted privilege of substantial value, in violation of § 23(b)(2).

VI. *Public Agencies and Elected Bodies May Adopt Their Own More Stringent Standards*

This Advisory sets forth the restrictions imposed by the conflict of interest law, G.L. c. 268A, on public employees’ recommendations for employment. Public agencies and elected bodies may also adopt their own more stringent standards regarding such recommendations. G.L. c. 268A, § 23(e).

This Advisory is intended to assist public employees understand how the conflict of interest law applies to recommendations for employment. This Advisory is not a substitute for legal advice specific to your particular situation, nor does it mention every aspect of the law that may apply in a particular situation. Public employees can obtain free,

confidential advice about the conflict of interest law from the Commission’s Legal Division by submitting an electronic request on our website, www.mass.gov/ethics. Public employees may also call the Commission at (617) 371-9500 and ask to speak to the Attorney of the Day or submit a written request for advice to the Commission at One Ashburton Place, Room 619, Boston, MA 02108, Attn: Legal Division.

Date authorized: January 18, 2013

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¹ “Substantial value” is defined as \$50 or more, 930 CMR 5.05. Paid employment, or unpaid employment with benefits, is of substantial value. In addition, unpaid employment without benefits may be of substantial value because of the value of the work experience gained.

² *EC-COI-95-5; EC-COI-91-13; EC-COI-87-37.*

³ “Immediate family” is one’s parents, siblings, spouse, and children, and the parents, siblings, and children of one’s spouse. G.L. c. 268A, §1(e).

⁴ G.L. c. 268A, §§ 6, 13, 19.

⁵ *EC-COI-93-11; In Re Craven*, 1980 SEC 17, *aff’d* 390 Mass. 191 (1983).

⁶ The conflict of interest law does not prohibit private recommendations of immediate family members, that is, recommendations made without the use of official title, official letterhead, or any other public resources, because a private recommendation does not involve any use of official position.

⁷ Because campaign contributions are required to be disclosed pursuant to G.L. c. 55, an elected public employee who recommends a campaign contributor is not required to make an additional disclosure pursuant to § 23(b)(3), but may not give selective preferential treatment to the contributor. 930 CMR 5.10.

⁸ *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), *aff’g In Re Craven*, 1980 SEC 17; *In Re Travis*, 2001 SEC 1014.

⁹ *In Re Piatelli*, 2010 SEC 2296, 2301-2 (telephone calls); *In Re Manning*, 2007 SEC 2076 (conversation); *In Re Murphy*, 2001 SEC 1003 (conversation); *In Re Singleton*, 1990 SEC 476, 477

(conversation); *In Re Cibley*, 1989 SEC 422 (telephone call).

¹⁰ Additional requirements apply to the hiring processes of the Trial Court and Probation, G.L. c. 211, § 10D, c. 211B, § 10D, c. 276, § 83. Also, all applicants for state employment are now required to disclose, in writing, “the names of any state employee who is related to the [applicant] as: spouse, parent, child or sibling or the spouse of the [applicant’s] parent, child or sibling.” *G.L. c. 268A, § 6B*.

¹¹ Giving something to someone in violation of a statute amounts to giving an “unwarranted privilege” for purposes of § 23(b)(2). *Advisory 11-1; EC-COI-98-2*.

¹² An entity is a “public service corporation” if it is “organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business;” subject to the requisite degree of governmental control and regulation; and it provides a public benefit. *Planning Board of Braintree v. Department of Public Utilities*, 420 Mass. 22, 26 (1995). The term is not limited to corporations, but may include municipal electric departments and other public utilities, and entities that provide public transportation. *Id.*

Advisory 05-05: The Rule of Necessity

If an elected member of a town or city board has a conflict of interest with respect to a matter before the board that involves his own financial interest or that of a partner, an immediate family member, a business organization with which the board member has certain affiliations, or a person or organization with whom the board member is negotiating or has any arrangement concerning future employment, that member will be disqualified from participating as a board member in that matter.¹ In some cases, especially when more than one member is disqualified, a board cannot act because it does not have a quorum or some other number of members required to take a valid affirmative vote. (If the number for a quorum is not set by law, a quorum is generally a majority of the board members.) In these circumstances, the board may be able to use the rule of necessity to permit the participation of the disqualified member(s) in order to allow the board to act. Individual elected officials, such as the mayor of

a municipality or a constitutional officer, also may be able to use the rule of necessity in order to carry out legally-required actions that would otherwise be barred by the conflict of interest law.

The rule of necessity is not a law written and passed by the Legislature. Rather, the rule of necessity was developed by judges who applied it in their court decisions. The rule of necessity may only be used as a last resort. The rule should be used only upon prior written advice from town or city counsel because improper use of the rule could result in a violation of the conflict of interest law.

The rule of necessity works as follows:

1. When used by an elected board member, the rule of necessity may be used only when an elected board is legally required to act on a matter and it lacks enough members to take valid official action solely due to board members being disqualified by conflicts of interest from participating in the matter.

Example: A five-member elected board has a meeting and all members are present. Three of the five members have conflicts in a matter before the board in which the board is legally required to act. Three members are the quorum necessary for a decision. The two members without conflicts do not constitute a quorum. The board cannot act. The rule of necessity will permit all members to participate in that matter.

Example: A five-member elected board has a meeting involving a matter in which the board is legally required to act and four members are present (one member is sick at home). Two of the four present members have conflicts. A quorum is three. The one member who is sick at home does not have a conflict. The rule of necessity may not be used because, even though a quorum of the board which is able to act is not present at that particular meeting, there is a quorum of the board which is able to act. The absence of one member does not permit the use of the rule of necessity.

Example: A five-member elected board has a meeting involving a matter in which the board is legally required to act and all members are present. One member has a conflict and is unable to participate. The vote is a two-to-two tie. The rule of necessity may not be used to break the tie. In general, a tie vote defeats the issue being voted on. (Stated differently, a tie vote will maintain the status quo.)

Example: A five-member elected board has a meeting and all members are present. A quorum is three.

However, one agenda item, on which board action is legally required, needs four votes, rather than the usual simple majority, for an affirmative decision. Two of the board members have conflicts. Although a quorum is available, the required four votes needed for this particular matter cannot be obtained without the participation of one or both of the members who have conflicts. The rule of necessity may be invoked and all five of the board members could participate.

If one or more members of an elected board have "appearances" of conflicts of interest that can be dispelled by making a written disclosure, the rule of necessity may not be invoked. Section 23(b)(3) of the conflict of interest law prohibits a public official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that the public official is likely to act or fail to act as a result of kinship, rank or position. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his or her appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

Example: One member of a three-member elected board has a daughter who is a candidate for a police officer position. That board member cannot participate in the board's hiring decision because his daughter is an immediate family member and she has a financial interest in the matter. A second member has a niece who is a candidate for the same position. Because a niece is not "immediate family," the second member can make a disclosure about his niece to dispel the appearance of a conflict of interest and may then participate in the matter. Thus, the three-member board has a quorum and is able to act and the rule of necessity may not be invoked.

2. Before invoking the rule of necessity, every effort must be made to find another board or other authority in the municipality with the legal power to act in place of the board that could not obtain a quorum due to conflicts of interest. (Municipal counsel should be consulted to identify another municipal board or authority to act.)

3. While the absence of one or more board members is generally not sufficient cause to invoke the rule of necessity, when a board is legally required to take action by a certain time and is unable to do so because of the lack of a quorum, the rule of necessity may be invoked.

Example: A statute requires selectmen to approve payroll warrants on a weekly basis. One selectman of a three-member board is absent and the board cannot otherwise obtain a quorum due to the disqualification of one selectman whose immediate family member works for the town. The rule of necessity may be invoked.

4. The rule of necessity should be invoked by one or more of the otherwise disqualified members, upon advice from town or city counsel or the State Ethics Commission.

5. If it is proper for the rule of necessity to be used, it should be clearly indicated in the minutes of the meeting that as a result of disqualification of members due to conflicts of interests, the board lacked a sufficient number of members necessary to take a valid vote and, as a last resort, that all those disqualified may now participate under the rule of necessity. Each disqualified member who wishes to participate under the rule of necessity first must disclose publicly the facts that created the conflict.

Example: Two members of a three-member elected board have conflicts of interest that prohibit them from participating in a matter involving property owned by a private school for which they serve as trustees. No other board exists which can act on the matter before the board. After consulting with town counsel, one of the board members with a conflict should invoke the rule of necessity and direct that it be included in the minutes. Both of the board members who had been prohibited from participating may then do so. Prior to such participation, however, each must disclose the fact that they serve as trustees and may then participate in the matter.

It should be noted that invoking the rule of necessity does not require all previously disqualified members to participate; it merely permits their participation.

While the rule of necessity is most commonly invoked by elected multi-member boards, it is also applicable to individual elected officials, such as the mayor of a municipality, or a constitutional officer. For an individual elected official to be able to use the rule of necessity, the same requirements explained above apply: the official must be legally required to act on a matter in which he is disqualified by a conflict of interest from acting, and there is no one else legally qualified to act in that matter. In that situation, the individual elected official may invoke the rule of necessity to the minimum extent necessary

to allow him to take the required actions otherwise barred by the conflict of interest law. If the legal duty to act permits the official to delegate that duty, then the official may invoke the rule of necessity for the limited purpose of designating another person to carry out the required action. If he delegates, he cannot otherwise participate in the matter. However, if the legal duty to act is non-delegable, then the individual elected official may invoke the rule of necessity to take all actions required legally of him. Any such invocation of the rule should be documented by the elected official in a writing filed publicly with the municipal clerk, or, if the elected official holds a state or county office, with the State Ethics Commission.

Example: The General Laws confer upon a Mayor the sole power to act as her City's bargaining representative for purposes of negotiating a collective bargaining agreement with the City's firefighters, but permit the Mayor to select a "designated representative" to negotiate such an agreement in her place. The Mayor's spouse is a firefighter who has a financial interest in his union's collective bargaining agreement with the City. Section 19 of the conflict of interest law would prohibit the Mayor from participating in the firefighters' collective bargaining agreement. The Mayor may invoke the rule of necessity to designate an alternate to serve as the City's collective bargaining representative with the firefighter's union. If she does so, the Mayor cannot otherwise participate in the matter.

Example: The General Laws require a Mayor to take a variety of actions with respect to making changes to the health insurance coverage that the City offers to its subscribers, and do not contain any provision authorizing anyone to act in the place of the Mayor or permitting the Mayor to delegate those duties. The Mayor himself is a subscriber to his City's health insurance coverage, and would be disqualified by Section 19 of the conflict of interest law from participating in matters relating to the City's coverage, because he has a financial interest in those matters. The Mayor may invoke the rule of necessity to permit him to take all actions required legally of him in his official capacity under the General Laws with respect to changes to the City's health insurance coverage.

* * *

For more information about the state conflict of interest and financial disclosure laws (G.L. c. 268A

& c. 268B), including the subjects discussed in this Advisory, please contact:

State Ethics Commission
One Ashburton Place, Room 619
Boston, MA 02108
(617) 371-9500

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¹ Public employees who cannot participate in matters because of a conflict of interest should contact the Ethics Commission for advice regarding the rule of necessity.

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2013**

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In the Matter of Pine duBois

The Commission approved a Disposition Agreement in which Town of Kingston Community Preservation Committee member Pine duBois admitted to violating the conflict of interest law by advocating, in her capacity as the unpaid president of the non-profit Jones River Landing Environmental Heritage Center, for \$75,000 in Community Preservation Committee funds to restore two boat sheds located on Jones River Landing property. DuBois also admitted to violating the conflict law by failing to disclose her relationship with Jones River Landing to her appointing authority. Pursuant to the Agreement, duBois paid a \$2,500 civil penalty. In October, 2008, Jones River Landing applied to the CPC for \$75,000 to restore two boat sheds in the Holmes/Watson Boatyard, a property owned by Jones River Landing. Thereafter, duBois numerically ranked nine projects seeking CPC funding, giving the Holmes/Watson Project her second-highest score; duBois voted to send Jones River Landing's \$75,000 CPC funding request to Town Meeting; duBois, acting on behalf of Jones River Landing, requested the CPC sign off on a payment schedule of \$40,000 for partial payment to Jones River Landing for matters related to the Holmes/Watson Project; and, as a CPC member, duBois voted to approve the payment schedule. DuBois violated section 17(c) by acting as agent for Jones River Landing before the CPC, as described above, and duBois violated section 23(b)(3) by, in her role as a CPC member, ranking the Holmes/Watson Project for CPC funds, voting to allocate \$75,000 to the project, and voting to approve the \$40,000 payment schedule. Although other CPC members knew about duBois' position with Jones River Landing, she did not make a written disclosure to her appointing authority, the Town Moderator, to dispel the appearance of a conflict of interest until February 19, 2010, well after she had advocated for her organization before the CPC.

In the Matter of Guy Glodis

The Commission issued a Decision and Order in which it found that the Commission's Enforcement

Division failed to prove that former Worcester County Sheriff Guy W. Glodis caused an ineligible inmate to be placed on work release to accommodate the request of the inmate's employer, who was Glodis' friend and campaign contributor. The Commission concluded that the Enforcement Division did not prove "by a preponderance of the evidence that Glodis knowingly or with reason to know used or attempted to use his official position to secure an unwarranted privilege for Joseph T. Duggan, III or David Massad which was not properly available to similarly situated individuals." Duggan surrendered to the Worcester County Jail on October 29, 2009, and was placed on work release the next day, on October 30, 2009. The Enforcement Division argued that inferences should be drawn from certain telephone calls that occurred between October 22, 2009 and October 30, 2009, including calls between Massad and Glodis on October 28, 2009, to support its claim that Glodis explicitly or implicitly directed his subordinates to place Duggan on work release. However, all three of the Worcester County Jail employees who were involved in recommending and approving Duggan's work release testified that they did not discuss Duggan's placement with Glodis or with Special Sheriff Jeffrey Turco, who was responsible for overseeing the day-to-day operations of the jail. Therefore, the Commission determined that there was no evidence that Glodis participated in placing Duggan on work release. The Commission also concluded that Duggan's placement on work release was not an unwarranted privilege because the decision to place him on work release was based on the fact that Duggan's charges were non-violent in nature, the length of his sentence, the fact that Duggan had been released on personal recognizance in the case where charges were pending against him, as well as the overcrowded conditions at the jail. The Enforcement Division also argued that Glodis violated section 23(b)(3) by passing on the request of his friend and campaign contributor that Duggan be placed on work release, and failing to disclose that relationship. The Commission, however, found that this allegation was not proven since there was no

evidence that Glodis passed along Massad's request to jail employees.

In the Matter of Sherman Briggs, Jr.

The Commission approved a Disposition Agreement in which Marion Conservation Commission member Sherman E. Briggs Jr. admitted to violating the conflict of interest law by voting as a Conservation Commission member to issue an Order of Conditions authorizing Tabor Academy to install salt water tanks while having a reasonably foreseeable financial interest in the matter, and then by being paid by Tabor Academy to perform the excavation work required to install the tanks. Pursuant to the Agreement, Briggs paid a \$7,500 civil penalty. Briggs owns Sherman E. Briggs Excavating, a business which has performed excavating work for Tabor Academy, a private school in Marion, for more than 20 years. Sometime prior to June 3, 2011, Briggs met with Tabor Academy officials to discuss a project to install two saltwater tanks at Tabor Academy's Marine Science Center. Briggs was consulted about how and where to locate the concrete footings to support the tanks. On June 3, 2011, Tabor Academy filed a Notice of Intent with the Conservation Commission regarding the project. At the Conservation Commission's June 22, 2011 hearing on the Notice of Intent, Briggs, in his capacity as a Conservation Commission member, discussed the Notice of Intent and voted to issue an Order of Conditions regarding the Notice of Intent. On June 27, 2011, the Conservation Commission issued the Order of Conditions, which allowed the work to install the tanks to proceed. Sometime after June 22, 2011, but before July 6, 2011, Tabor Academy hired Briggs Excavating to perform the excavation work for the project. Briggs performed and completed the work in July 2011, and was paid \$8,030 by Tabor Academy. Briggs violated section 19 by, as a Conservation Commission member, discussing Tabor Academy's Notice of Intent and voting to approve the Order of Conditions, which allowed the project to proceed. Briggs had a reasonably foreseeable financial interest in the decision to issue the Order of Conditions since his business had a long history of performing excavating work for Tabor Academy, and Briggs had recently met with Tabor Academy officials to advise them on how and where to install the concrete footings for the tanks. Briggs violated section 17(a) by receiving \$8,030 from Tabor Academy as payment for performing excavation work, which was in relation to the Order of Conditions issued by the Conservation Commission, a particular matter in which the Town of Marion,

through the Conservation Commission, was a party to and/or had a direct and substantial interest.

In the Matter of Michael Byrnes

The Commission concluded an adjudicatory proceeding involving former Executive Office of Labor and Workforce Development Division of Labor Director Michael Byrnes by approving a Disposition Agreement in which Byrnes admits that he violated the financial disclosure law by failing to timely file his 2011 Statement of Financial Interests. Byrnes paid a \$625 civil penalty. The Commission also approved a Joint Motion to Dismiss, which concluded the adjudicatory proceeding. Byrnes was required to file his 2011 SFI by May 1, 2012. He filed it 246 days late, on January 22, 2013. According to the Commission's penalty schedule for late filers, Byrnes faced a possible civil penalty of \$1,250. However, because Byrnes provided evidence of sufficient mitigating factors, the Commission reduced the civil penalty to \$625. Byrnes served in his former position of EOLWD Division of Labor Director, a designated major policy-making position, for thirty (30) days or more in calendar year 2011, and therefore was required to file an SFI for calendar year 2011 with the Commission.

In the Matter of Brian Connors

The Commission issued a public education letter to East Bridgewater Police Department Special Police Officer Brian Connors for entering into contracts with the East Bridgewater Police Department through his company, Flagship Security Systems, Inc., in violation of the conflict of interest law. In 2003, the then police chief appointed Connors as a special police officer, an unpaid position. Although Connors was a special police officer, he had no shifts or assigned duties and did not wear a badge or a uniform. Nevertheless, as a result of his appointment to the position of special police officer, Connors became a "municipal employee" for purposes of the conflict of interest law. In 2007, Connors assisted the police department in applying for a federal Secure Our Schools grant to install security systems in schools and the police department. He also provided information that was later included in the bid specifications used to award the contract to install the security equipment. Thus, Connors was also a "municipal employee" for the purposes of the conflict

of interest law because he provided assistance to the police department regarding the grant and the bid specifications. From 2008-2011, Flagship invoices indicated that Flagship earned approximately \$400,000 for security-related equipment and services it provided to the police department in connection with the grant. In 2009, Flagship billed the police department approximately \$15,000 for renovations to the police department dispatch area. Connors violated § 19 by, as a municipal employee, providing information that was included in the bid specifications for the Secure Our Schools grant, while knowing that he intended to bid on that contract. If, prior to participating in the matter, Connors had filed a written disclosure with the police chief about his financial interest in the matter, and if he had received an advance written determination from the police chief that his financial interest was not so substantial as to be deemed likely to affect the integrity of his services which the municipality may expect from him, he could have participated in the matter without violating § 19. Connors did not seek or obtain such a determination. Connors violated section 20 by, as a special police officer, having a financial interest in the Flagship Security contracts with the police department as a shareholder and president of Flagship. Although there are several exemptions to section 20, Connors was not eligible for any of them.

In the Matter of Philip Poley

The Commission approved a Disposition Agreement in which Philip Poley, the former Chief Operating Officer of MassHealth, a department within the Executive Office of Health and Human Services, admitted to repeatedly violating the conflict of interest law. Poley, a former Brookline resident, paid a \$25,000 civil penalty. Poley admitted that he violated the law by contacting managers at Accenture, an international technology and business consulting firm, to discuss and negotiate prospective employment with Accenture, while also working on a MassHealth/UMass project on which Poley solicited Accenture's involvement. Poley also admitted to violating the conflict of interest law after leaving his state position by working as an Accenture employee on matters relating to the MassHealth/UMass project. In August 2009, Poley began working on a proposal to develop a MassHealth Analytics Unit at UMass

Medical School to analyze and manage Medicaid data. In October 2009, Poley sent the proposal to a managing director at Accenture, who shared it with several colleagues. In November 2009, Poley met with Accenture representatives to discuss the Analytics Unit. An Accenture manager who had attended the meeting emailed his colleagues to tell them that MassHealth wanted to outsource the creation of the Analytics Unit to UMass, who would then "contract directly with Accenture" on how to create it. Over the course of several months, Poley had periodic contact with Accenture executives regarding the project and was actively involved in its development. In July 2010, UMass sent a Request for Proposals to Accenture for management consultant services for the project. No other companies were contacted or invited to respond. Accenture submitted a proposal in July, and in November 2010, Accenture and MassHealth finalized a \$420,000 consulting contract for the project. Around the same time Poley contacted Accenture regarding the Analytics Unit in the fall of 2009, he began discussions with Accenture executives about his career. In early 2009, he asked a MassHealth colleague who previously worked for Accenture to contact a company executive on his behalf and say that Poley wanted to have a "confidential conversation... to explore career alternatives." As the Analytics Unit project's development progressed – leading up to a sole source contract between UMass and Accenture – Poley eventually began negotiating with Accenture regarding a potential job title and compensation. In early June 2010, Poley was told that he had successfully cleared Accenture's internal conflict of interest review and that he would begin the interview process, which took place in early July. On June 29, 2010, Poley filed a disclosure with the EOHHS Undersecretary and with the State Ethics Commission regarding his employment discussions with Accenture. Poley's appointing authority promptly removed him from any further participation in the Analytics Unit project. Poley left MassHealth on August 12, 2010, and began work for Accenture as a senior manager on September 16, 2010, earning a base annual salary of \$185,000, with the potential to earn additional performance bonuses. On several occasions after joining Accenture, Poley provided advice and guidance to his fellow Accenture employees regarding the contract with UMass. From

November 2009 to June 29, 2010, Poley took official actions in his capacity as the MassHealth COO in matters involving Accenture, while he was actively seeking future employment with the company. Poley did not file a timely disclosure prior to taking these actions, and, therefore, repeatedly violated Section 23(b)(3). After Poley began employment negotiations with Accenture, which occurred at least as early as April 2010, he participated in meetings and decisions related to the proposed Analytics Unit project, a particular matter in which Accenture had a financial interest. By doing so, Poley repeatedly violated section 6. Poley, as an Accenture employee, repeatedly violated section 5(a) by receiving compensation from Accenture in connection with the Analytics Unit project, a particular matter in which he participated as a MassHealth employee.

In the Matter of Charles Borstel

The Commission allowed a Joint Motion to Dismiss the Adjudicatory Proceeding involving Charles Borstel, former Assistant to the Director of the Division of Professional Licensure, for allegedly violating the financial disclosure law. As the DPL Assistant to the Director, Borstel was a “designated major policy maker,” and was required to file his 2011 SFI by May 1, 2012. In allowing the Motion, the Commission noted that Borstel contacted the Enforcement Division on April 1, 2013 and explained that he mistakenly believed he did not have to file a 2011 SFI. He also provided evidence to show that a Formal Notice of Lateness was sent to an e-mail address he had stopped using because it had been compromised. Borstel filed his 2011 SFI on April 4, 2013. Because he did not receive the e-mailed Notice, the Commission allowed the motion and dismissed the adjudicatory proceeding.

In the Matter of Dennis O’Brien The Commission approved a Disposition Agreement in which former Templeton Board of Selectmen member and Municipal Building Study Committee member Dennis O’Brien admitted to violating the conflict of interest law by participating in the Town’s purchase of a vacant factory building located directly across the street from the O’Brien residence. O’Brien paid a \$1,000 civil penalty. In 2009, the Committee was formed to study the cost of acquiring a building to use as a town hall and to develop the specifications

for a request for proposals to identify a suitable building. In 2010, the Committee provided the specifications to the Selectmen so that the Selectmen could draft an RFP for a suitable building. O’Brien then participated as a selectman in drafting, approving and issuing the RFP, which specified that the Town acquire a building with at least 12,000 square feet of space. Four responses to the RFP were received, but the only one that met the RFP specifications was the one that proposed the building across the street from the O’Brien residence. The building across from the O’Brien home was a 12,000 square foot, vacant factory building, which O’Brien described as an “eyesore.” O’Brien, as a Committee member, participated in recommending that Town Meeting approve the purchase of the building. After the purchase was approved at the 2010 Town Meeting, O’Brien then participated as a selectman to finalize the purchase and authorize the payment of \$400,000 for the building. O’Brien, his wife and their three adult children had a financial interest in the Town’s purchase of the building because of the close proximity of the building to the O’Brien home. Due to financial considerations, the building was never renovated or converted into a town hall, and has remained vacant since 2009. The Town is currently attempting to sell the property. O’Brien, as both a Committee member and a Selectmen, violated section 19 by participating in the Town’s purchase of a building directly across the street from his family home.

In the Matter of Algird Sunskis

The Commission issued a Ruling and Order of Dismissal granting a Joint Motion to Dismiss the Adjudicatory Proceeding involving Algird Sunskis. In taking this action, the Commission did not make any determination as to whether Sunskis violated the conflict of interest law, but rather dismissed the proceedings for the reason stated in the Joint Motion, i.e., that Sunskis was evaluated on June 27, 2013, and the written report of that evaluation, which was impounded, indicated that Sunskis was “not appropriate for prosecution.” The Commission’s Enforcement Division issued an Order to Show Cause on March 11, 2013, alleging that Sunskis, who was employed as a teacher by the Lawrence Public Schools and was also the owner of Wellington Publishing Inc., violated G.L. c. 268A, the conflict of

interest law, by paying kickbacks on three occasions to LPS employees to obtain LPS contracts.

In the Matter of Richard McClure

The Commission issued a Decision and Order finding that former Chelmsford Planning Board member Richard McClure violated the conflict of interest law by representing clients in two separate lawsuits in which the Town of Chelmsford was a party. The Commission denied a motion by McClure to dismiss the proceedings and ordered McClure to pay a \$5,000 civil penalty. On April 5, 2011, McClure, an attorney in the Town, was elected to the Town Planning Board. As a Planning Board member, McClure was a municipal employee for the purposes of the conflict of interest law. On April 22, 2011, McClure, acting as a private attorney representing private individuals, filed suit against the Town Clerk in Middlesex Superior Court challenging the Clerk's interpretation of the Town Charter regarding the procedure for initiating a recall election of the Chelmsford Board of Selectmen. On April 22, 2011, prior to the start of a hearing in the Recall Lawsuit, and then again by letter dated April 26, 2011, Town Counsel warned McClure that his representation of clients in a lawsuit against the Town constituted a violation of the conflict of interest law. Although McClure could have ended the conflict of interest by either resigning from the Planning Board or by ceasing to act as agent or attorney for the plaintiffs in connection with the Recall Lawsuit, he did neither. In early May 2011, acting on a motion from the Town Clerk, the court disqualified McClure from representing any party other than himself in the Recall Lawsuit. He unsuccessfully appealed his disqualification. Additionally, in 2010, prior to his election to the Planning Board, McClure filed a lawsuit in Land Court for four Chelmsford residents involved in a property dispute (the "Fair Street Lawsuit"), and in October 2010, filed an amended complaint naming the Town a defendant in the Fair Street Lawsuit. After McClure was elected to the Planning Board, Town Counsel admonished him in writing on May 24, 2011, stating that McClure's representation of the plaintiffs was a violation of the conflict of interest law and requesting his withdrawal as counsel in the Fair Street Lawsuit. On October 6, 2011, the court allowed the defendants' motion to disqualify McClure from the Fair Street Lawsuit, and McClure

withdrew as counsel. The Commission found that "... by his actions in commencing and continuing to serve as a private attorney in the Recall and Fair Street lawsuits, McClure placed himself in situations where the interests of and his duties to his private clients and his employing municipality were in conflict, and, in each case, he chose his duties to his clients and their interests over his duties to the Town and its interests" The Commission further noted that "While willfulness and knowledge are not required elements of a § 17(c) violation, for purposes of determining the resolution of this matter, we find that McClure's actions, particularly after his warning by Town Counsel on April 22, 2011, were knowing and willful."

In the Matter of Cheryl Jacques

The Commission issued a Decision and Order in which it found that the Commission's Enforcement Division failed to prove by a preponderance of the evidence its allegation that Cheryl Jacques, an administrative law judge for the Department of Industrial Accidents, attempted to use her official position to demand that a dental office write off a debt of more than \$1,000 incurred by her brother-in-law. The Enforcement Division filed an Order to Show Cause on March 12, 2012, alleging that Jacques violated section 23(b)(2)(ii) of the conflict of interest law by invoking her position as a judge in an attempt to persuade the staff of Tremont Dental to write off more than \$1,000 owed to the dental office by her brother-in-law, Preston Green. The case centered on three telephone conversations on November 12, 2010, during which Jacques contacted Tremont Dental on Green's behalf and argued that Tremont Dental had represented to Green that it was a preferred provider organization, and then incorrectly billed him at higher non-PPO rates. The owner of the dental office, Dr. Og Lim, and the office manager, Jin Choi, testified at the adjudicatory hearing that, during the phone calls, Jacques identified herself as a judge and spoke in an intimidating manner. Dr. Lim said that Jacques threatened to contact the insurance company to have the dental office removed as a plan provider, and also to report the dental office to the Consumer Protection Division of the Attorney General's Office.

Jacques testified that she made the calls from her personal cell phone and did not identify herself as a judge, but rather as an attorney and as Green's sister. Jacques testified that Dr. Lim stated she had to get off the phone because she had patients waiting for her, and Jacques then "'inadvertently' identified herself as a judge. 'I said, I had a courtroom full of people, and then she asked me if I was a judge and then I was trapped. I had to say yes. I wasn't going to lie...'" Jacques said that she never intended to introduce her position into the conversation and testified that she probably should have ended the call immediately. The Commission concluded that there was "no basis for determining whether Dr. Lim's testimony that Jacques mentioned her title purposefully or Jacques's testimony that she mentioned it inadvertently is more credible. While best avoided, we would not consider an inadvertent mention of one's position, in response to someone else's question asking whether one holds that position, to amount to a knowing attempted use of position in violation of §23(b)(2)." The Commission further concluded that "[a]fter an assessment of credibility, the facts established by the evidence in this case are equally consistent with no violation as with a violation. Accordingly, [the Enforcement Division] has not proved by a preponderance of the evidence that Jacques knowingly, or with reason to know, attempted to use her position to gain an unwarranted privilege for Green."

In the Matter of Delwin Dickinson

The Commission approved a Disposition Agreement in which Delwin Dickinson, the former Hosting Services Director for the Commonwealth of Massachusetts Information Technology Division, admitted to violating the conflict of interest law by awarding contracts and approving payments to hardware and software reseller Advizex after entering into employment negotiations with the company. Dickinson, a Woburn resident, paid a \$30,000 civil penalty. Dickinson interviewed for a project manager position with Advizex on May 9, 2012. On the same day, Dickinson sought information from Advizex about ITD obtaining Hewlett Packard support. Subsequently, as the ITD Hosting Services Director, Dickinson drafted and posted requests for quotes for two contracts for the maintenance and technical support of ITD's HP and Intel brand

products. Dickinson knew Advizex would submit quotes for both contracts because he had been in recent contact with the company regarding ITD obtaining HP support, and the company had an extensive history of doing business with ITD. After Dickinson received the vendors' quotes, including quotes from Advizex, Dickinson selected ITD staff to evaluate and score the vendor responses, and he collected the staff scores to calculate the winning vendors. On or about June 26, 2012, based on the scoring and Advizex's best and final offer, Dickinson awarded both contracts to Advizex, in the amounts of \$414,500 and \$141,324. On July 12, 2012, Dickinson approved a payment of \$414,500 to Advizex in connection with one of the contracts. After Dickinson began negotiating for employment with Advizex, he also approved payments to Advizex in connection with pre-existing contracts between the company and ITD in the amounts of \$5,164, \$2,175.77, and \$32,594.25, respectively. Between May 2012 and July 12, 2012, Dickinson approved payments to Advizex totaling more than \$454,000. Advizex hired Dickinson in September 2012. By, in his capacity as the ITD Hosting Services Director, awarding the two contracts to Advizex and approving vendor payments to Advizex, while he was negotiating for employment with Advizex, Dickinson repeatedly violated section 6.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 13-0001**

**IN THE MATTER OF
PINE duBOIS**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Pine duBois (“duBois”) 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 16, 2011, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by duBois. On January 20, 2012, the Commission concluded its inquiry and found reasonable cause to believe that duBois violated G.L. c. 268A, §§ 17 and 23.

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

1. The Town of Kingston (the “Town”) Community Preservation Committee (“CPC”) is charged with making recommendations to Town Meeting for: the acquisition, creation and preservation of open space; the acquisition, preservation, restoration and rehabilitation of historic resources; the acquisition, creation and preservation of land for recreational use; the creation, preservation and support of community housing; and rehabilitation or restoration of such open space, land for recreational use and community housing that is acquired or created. Pursuant to the Community Preservation Act, The CPC annually recommends setting aside at least 10% of the annual revenues received by the Community Preservation Fund for each of the following purposes: (a) open space (not including land for recreational use); (b) historic resources; and (c) community housing.

2. DuBois was, during the relevant time, a CPC member. As such, duBois was a municipal employee as that term is defined in G.L. c. 268A, § 1.

3. DuBois was appointed by the Town’s town moderator to the Town’s Open Space Committee; in turn, the Open Space Committee voted to make duBois its designee to the CPC.

4. Also during the relevant time, duBois was the unpaid president of the Jones River Landing Environmental Heritage Center (the “Jones River Landing”), a nonprofit organization established as a supporting organization of the Jones River Watershed Association, a non-profit environmental organization.

HOLMES/WATSON BOATYARD PROJECT

Findings of Fact

5. On or about October 31, 2008, the Jones River Landing applied to the CPC for \$75,000 to restore two boatsheds in the Holmes/Watson Boatyard (“Holmes/Watson Project”), a property owned by the Jones River Landing, and on which the Town holds a conservation restriction.

6. At the time that the Holmes/Watson Project came before the CPC, the CPC chair and other members knew that duBois was affiliated with the Jones River Landing.

7. During a January 13, 2009 CPC review of the Holmes/Watson Project, duBois, acting on behalf of the Jones River Landing, informed the CPC that the Jones River Landing needed funds to pay down its debt on the Holmes/Watson Boatyard property in order to receive matching funds from a private donor.

8. During a February 4, 2009 CPC meeting, duBois, as a CPC member, numerically ranked nine projects that were seeking CPC funding, including the Holmes/Watson Project. DuBois gave the Holmes/Watson Project her second highest score.

9. Also during the February 4, 2009 CPC meeting, duBois, as a CPC member, voted to approve the project for submission to Town Meeting for approval of funding for the Holmes/Watson Project for the requested amount of \$75,000, which was for the

purchase of a preservation restriction and restoration of an historic boat shed.

10. During a May 12, 2009 CPC meeting, duBois, acting on behalf of the Jones River Landing, asked when the Jones River Landing needed to obtain a preservation restriction in order to receive \$40,000 in partial CPC funding.

11. During a July 14, 2009 CPC meeting, duBois, acting on behalf of the Jones River Landing, requested guidance as to whether the Jones River Landing could obtain the approved Holmes/Watson Project funding while awaiting the Massachusetts Historical Commission's decision to approve a preservation restriction.^[1]

12. During an August 11, 2009 CPC meeting, duBois, acting on behalf of the Jones River Landing, requested that the CPC sign off on a payment schedule of \$40,000 to the Jones River Landing for the Holmes/Watson Project so that the document would be ready for processing upon approval of the Massachusetts Historical Commission preservation restriction. DuBois then voted as a CPC member to have the CPC sign off on the schedule, although she was not one of the CPC members who later signed the schedule.

13. DuBois, acting on behalf of the Jones River Landing, provided updates on the Holmes/Watson Project during the CPC meetings of September 16, 2009, and January 14, 2010, as requested by the CPC.

Conclusions of Law

Section 17(c)

14. Section 17(c) of G.L. c. 268A prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent for anyone other than the municipality in connection with a particular matter^[2] in which the municipality is a party or has a direct and substantial interest.

15. The decision to recommend that CPC funds be awarded to the Holmes/Watson Project was a particular matter.

16. The Town of Kingston was a party to, and had a direct and substantial interest in, that particular

matter because the CPC funds were Town funds administered through the CPC based on Town Meeting approval of funding for the project.

17. DuBois, as the unpaid president of the Jones River Landing, acted as agent for the Jones River Landing in relation to that particular matter by (1) informing the CPC that the Jones River Landing needed to pay down the debt in order to obtain matching funds; (2) asking the CPC when the Jones River Landing needed to obtain a preservation restriction in order to receive the \$40,000 in partial CPC funding; (3) requesting guidance from the CPC as to how the Jones River Landing could obtain funding while awaiting the preservation restriction; (4) requesting that the CPC sign off on a payment schedule of \$40,000; and (5) providing updates to the CPC on behalf of the Jones River Landing at the CPC's meetings on May 12, 2009, September 16, 2009 and January 14, 2010. Therefore, duBois, otherwise than in the proper discharge of official duties, acted as agent for someone other than the town in connection with a particular matter in which the town was a party and/or had a direct and substantial interest. By doing so, duBois violated § 17(c).

Section 23(b)(3)

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. The section further provides that it shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion. Such disclosure must be made before taking any official action.

19. By, as a CPC member, ranking the Holmes/Watson Project for CPC funds, voting to allocate \$75,000 to the project, and voting to approve the \$40,000 payment schedule, duBois 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 Jones River Landing could unduly enjoy duBois' favor in the performance of her official duties. DuBois did not file a timely disclosure^[3] to dispel this appearance of a conflict of interest. Therefore, in so acting, duBois violated G.L. c. 268A, § 23(b)(3).

Resolution

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

1. that Pine duBois pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$ 2,500^[4] as a civil penalty for violating G.L. c. 268A, §§ 17(c), and 23(b)(3)^[5] as described above; and
2. that Pine duBois waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: February 28, 2013

^[1] A "preservation restriction" is a legal agreement between a landowner and a governmental entity placing limitations on development and certain uses of land.

^[2] "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. *G.L. c. 268A, 1(k)*.

^[3] DuBois filed a disclosure with the town moderator on February 19, 2010.

^[4] The maximum civil penalty for violations of the conflict of interest law occurring prior to September 29, 2009, was \$2,000 per violation. Violations occurring on or after that date are generally subject to a maximum penalty of \$10,000. See Chapter 28 of the Acts of 2009.

^[5] As to the § 23(b)(3) violations, the Commission finds it somewhat mitigating that CPC members were aware at the relevant time of duBois' position with the Jones River Landing.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 12-0008**

**IN THE MATTER OF
GUY W. GLODIS**

DECISION AND ORDER

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

Thomas R. Kiley, Esq.
Counsel for Respondent

Commissioners: Charles B. Swartwood, III, Ch.
Paula Finley Mangum
William B. J. Trach

Presiding Officer: Charles B. Swartwood, III, Ch.^[1]

INTRODUCTION

Petitioner filed an Order to Show Cause on June 28, 2012, against Respondent Guy W. Glodis ("Glodis"), former Sheriff of Worcester County, and filed an Amended Order to Show Cause ("AOTSC") on August 1, 2012. The AOTSC alleges that Glodis violated G.L. c. 268A, § 23(b)(2)(ii) by using his official position as Sheriff to directly or indirectly cause an ineligible inmate, Joseph T. Duggan, III

("Duggan"), to be placed on work release. The AOTSC also alleges that Glodis violated G.L. c. 268A, § 23(b)(3) by acting officially regarding a request he received from his friend and campaign contributor, David Massad ("Massad"), to place Duggan on work release so that Duggan could continue to manage Massad's construction projects.

An evidentiary hearing was held on November 19, 2012 and November 20, 2012.^[2] At the hearing, the parties made opening statements and introduced evidence through witnesses and exhibits. Both parties filed briefs.^[3] The parties presented closing arguments to the Commission on February 15, 2013.^[4]

The Commission began its deliberations in executive session on this matter on February 15, 2013, and continued deliberations on March 15, 2013 and March 27, 2013.^[5] In rendering this Final 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.

I. FINDINGS OF FACT

1. In October 2009, Glodis was Sheriff of Worcester County.

2. As Sheriff, Glodis was the highest authority at the Worcester County Jail ("WCJ").

3. The following steps occur when an inmate is committed to the WCJ: (1) the inmate is booked and given a number; (2) the inmate meets with intake personnel and is asked a series of questions, e.g., family data; (3) the inmate obtains a photo identification; (4) the inmate meets with classification to determine his initial housing unit; (5) the inmate is escorted to his housing unit; (6) depending on the time the inmate entered the WCJ, he may or may not have a meal and go to bed; (7) the next day the inmate would have orientation; (8) the inmate would then see a social worker; (9) the social worker would have 72 hours to prepare all the paperwork needed for a classification board; and (10) within fifteen (15) days, the inmate would appear before the board to determine his/her classification (i.e. minimum, medium, maximum security).

4. Massad is a well-known businessman in Worcester County.

5. Duggan has worked for Massad for approximately ten years and he has known Massad for thirty years.

6. In October 2009, Duggan was the Project Manager for the construction of Massad's GM dealership showroom. Duggan also managed the construction of Massad's twenty-eight unit residential building in Ashland. As the Project Manager, Duggan was responsible for reviewing plans, setting prices and supervising approximately forty subcontractors.

7. On October 22, 2009, Duggan was found guilty of larceny and was sentenced to twenty-four months in the WCJ. Massad agreed to pay \$18,000 in restitution on Duggan's behalf and as a result, Duggan's sentence was reduced to four months. Duggan's sentence was stayed for seven days and he did not have to report to the WCJ until October 29, 2009.

8. Massad and Duggan knew that if Duggan went to jail, construction would have to stop on the projects Duggan was managing.

9. Massad and Duggan knew that the WCJ had a work release program that allowed eligible inmates to leave the jail for work.

10. During the seven days that Duggan's sentence was stayed, he "called every friend [he] had that had connections with the jail" to see if anyone could help him to get into the work release program.

11. Duggan contacted his attorney Matt Pingeton; he also contacted John Harvey of Francis Harvey & Sons Construction, who, according to Duggan, had numerous connections with Worcester County Sheriff's Department ("WCSD") employees. Duggan also contacted his friends who worked for the WCSD, including Deputy Superintendent Scott Bove, Lieutenant of Classification Peter Bove, and Captain of Classification Paul Quinn, all of whom Duggan knew from frequenting Ralph's Tavern. Ralph's Tavern is owned by Scott Bove and is frequented by a number of WCSD employees.

12. During Duggan's first night in jail, a guard approached him and said, "John Harvey says hi and we'll take care of you." Duggan told the guard that he wanted to get out on work release and the guard responded "[w]e're working on it."

13. Massad and Glodis have known each other for many years. Long before Glodis became Sheriff, he worked in the Marketing Department at Commerce Bank, which Massad owns.

14. Massad has regularly contributed to Glodis' political campaigns. In each of the years 2006, 2007, 2009 and 2010 Massad contributed \$500 to Glodis' campaigns. Massad testified that he "contribute[s] toward everybody and everything in Worcester."

15. In October 2009, Massad called Glodis to find out if Duggan could be placed on work release. Glodis told Massad, "'I don't do that,' but . . . 'I'll have somebody call you back.'"

16. Glodis could not recall any telephone conversations with Massad regarding Duggan.

17. Glodis was regularly asked questions about inmates and their status and his standard responses were: (1) "Hey, I'll get back to you," (2) "Let me look into it," (3) "I'll have somebody call you," and (4) "I'm not sure. Let's follow up and have a conversation."

18. As Sheriff, Glodis was not involved in the daily operations of the WCJ and, except for the initial meeting, Glodis did not attend weekly deputy meetings concerning the day-to-day operation of the jail.

19. Special Sheriff Jeffrey Turco ("Turco") was responsible for overseeing the day-to-day operations at the WCJ.

20. The following telephone calls were made on October 28, 2009, between Glodis' cell phone, Massad, Duggan and Special Sheriff Jeffrey Turco.^[6]

- 9:08 am: Massad called Duggan (1 minute)
- 9:11 am: Massad called Glodis (2 minutes)
- 9:27 am: Massad called Duggan (3 minutes)
- 10:07 am: Glodis called Massad (9 minutes)
- 10:34 am: Glodis called Turco (1 minute)

- 10:41 am: Massad called Duggan (10 minutes)
- 10:52 am: Glodis called Turco (1 minute)
- 3:16 pm: Massad called Glodis (2 minutes)
- 3:19 pm: Glodis called Turco (3 minutes)
- 3:21 pm: Massad called Duggan (1 minute)
- 3:22 pm: Massad called Duggan (2 minutes)

21. Glodis and Turco generally spoke multiple times per day. The following calls were made between Glodis' cell phone and Turco's number at the jail, which is also directed to the main office at the jail: nine calls on October 22, 2009; sixteen calls on October 23, 2009; twelve calls on both October 28 and 29, 2009; and fourteen calls on October 30, 2009. During this same time period, telephone calls between Massad and Glodis occurred only on October 28, 2009.

22. When an inmate arrives at the WCJ, a Social Worker is assigned to his case. The Social Worker does a psychosocial assessment of the inmate and sets up a three member classification board ("Board") for the inmate. The Board must meet and make a recommendation concerning where the inmate should be housed (i.e. maximum, medium or minimum security) within fifteen (15) days of the date the inmate was committed. The goal is to conduct a Board as quickly and as carefully as possible. A Supervisor must then review the Board's recommendation and decide whether to approve it.

23. All inmates who are stable and who arrive at the jail with non-violent charges are initially placed in a medium security facility before they are classified.

24. WCJ Classification Policy 942 ("Policy") sets forth the criteria that are used to determine classification and to decide whether an inmate is eligible for either the Work Release Program, or the Day Supervision Program also known as Correctional Opportunity Advancement Program ("COAP").^[7]

25. The work release program is a formal arrangement whereby an inmate is permitted to maintain approved and regular employment in the community, while returning to the custody of the WCJ during non-working hours.

26. Pursuant to the Policy the following criteria must be met for an inmate to be eligible for work release:

- i. Must be a sentenced inmate within one (1) year of parole eligibility or release date.
- ii. No criminal offense which carries a mandatory term of incarceration prohibiting work release.
- iii. Participation in education and/or substance abuse programs may be recommended to maintain eligibility status and approval.
- iv. Court ordered payments may be made a condition of participation in the work release program if the inmate is actually working.
- v. No warrants or cases pending before any courts.

27. The Policy was revised and reviewed on an annual basis. One of the goals in reviewing the Policy was to make sure that actual practice matched the written Policy.

28. In October 2009, overcrowding was a major problem at the WCJ.

29. Pursuant to a 1989 consent decree (the "Consent Decree") issued by U.S. District Court Judge Rya Zobel, which was amended in 2007, WCJ could only hold a total of 1,251 inmates. Additionally, each building had a cap for the number of inmates it could hold.

30. In 2009, a minimum security building was closed due to budget issues, which further exacerbated the overcrowding problem.

31. Director of Classification Michael Landgren ("Landgren"), testified that it is "a pressure that's on everybody" to take into account bed availability in each building.

32. Assistant Deputy Superintendent Thomas Chappel ("Chappel") testified that, "[e]very day I go to work hoping that we have enough beds for inmates that are coming in . . . that night It's probably the number one priority in classification, make sure we have enough beds."

33. Special Sheriff Turco testified that, "every single decision we made on a daily basis as a management team was how do we comply with the cap that we had agreed to with Judge Zobel."

34. Additional inmates could be placed in the work release building by adjusting inmate schedules so that some inmates worked at night. Turco testified that, "Judge Zobel's concern was that you didn't want eight people in a small room that was built for four. But we could get six in there or push it higher to eight if we knew eight weren't going to be there at a given time, because four were out working while four were inside."

35. Every morning at 8:00 a.m., the top managers met to discuss the counts, look at where they were having trouble with beds, and to try to determine whether they could place any more inmates on COAP.

36. There was a struggle to maintain availability of medium security beds. Placing inmates on COAP could free up medium security beds for more serious offenders.

37. In order to comply with the Consent Decree and prevent overcrowding, Reintegration Specialist/COAP Coordinator Donald Siergie ("Siergie") received a daily email detailing the current number of inmates, their charges and bail. Siergie would then screen the email for potential candidates for the COAP program.

38. During Glodis' time as Sheriff, the number of inmates in the COAP program increased significantly.

39. On October 29, 2009, Duggan surrendered to the WCJ.

40. At the time he surrendered, Duggan also had charges pending against him in the Westborough District Court for home improvement contractor violations.

41. Duggan had been released on personal recognizance in the Westborough case.

42. Shortly after Duggan arrived at the WCJ, he was interviewed by Human Service Counselor Jeffrey Heenan (“Heenan”).

43. On October 29, 2009, Heenan was asked by either Assistant Deputy Superintendent Chappel or Reintegration Specialist / COAP Coordinator Siergie to set up a Board for Duggan.

44. Heenan was regularly asked to conduct Boards for inmates and he did not find it unusual that he was asked to set up a Board for Duggan.

45. Neither Glodis nor Turco asked Heenan to set up a Board for Duggan.

46. Duggan’s Board hearing took place on October 30, 2009.

47. Classification Officer Marc Keddy (“Keddy”) served as the Chair of the Board. Heenan was also a member of the Board.

48. The Board recommended that Duggan be placed in minimum security and approved him for work release.

49. Heenan and Keddy recommended Duggan for work release because: (1) his charges were non-violent, (2) Duggan was not a flight risk, and (3) Duggan had positive institutional adjustment.

50. Although the Policy states that an inmate is not eligible for work release when he has a pending case, Heenan and Keddy recommended Duggan for work release anyway because the inmate count was high and overcrowding was a factor in their recommendation.

51. In October 2009, Heenan recommended inmates for minimum security facilities even though they had minor pending cases in order to free up medium security beds.

52. The Policy does not contain any exception to allow inmates with pending cases to be placed on work release.

53. Keddy considered each case on its merits and considered all of the relevant facts, whether or not they were set forth in the Policy.

54. On October 30, 2009, Assistant Deputy Superintendent Chappel reviewed and approved the Board’s recommendation that Duggan be placed on work release.

55. On the Sheriffs Information and Reporting System (SIRS) document approving the board’s recommendation, Chappel wrote “[a]pprove MINIMUM Security—Work Release due to nature of charges & history. Postpone COAP.”

56. Chappel believed that the Board’s recommendation for Duggan was appropriate based on the length of his sentence and the non-violent nature of his charges.

57. Chappel knew that the judge in the Westborough District Court had released Duggan on personal recognizance. Chappel did not consider Duggan’s Westborough case to be an “open case” because Duggan had appeared before a judge and had been released on personal recognizance in that case. Chappel could not explain why he had considered Duggan’s Westborough case to be “open” for purposes of the COAP program (as indicated by his notation “postpone COAP”) but not for the Work Release program.

58. Chappel did not simply approve every recommendation he received from the Board. He testified that, “[d]ecisions I make affect public safety. If I am not comfortable putting a guy in minimum security whether it be work release, whether it be COAP, I am not putting my name on it.”

59. Chappel testified that he never received advice from anyone in the WCJ administration about any classification decision he has made, nor has anyone in the administration ever suggested that he make a particular decision.

60. Duggan was permitted to begin working for Massad pursuant to the work release program on October 30, 2009, at 3:46 pm.

61. Massad testified that a day or so later (after his call to Glodis), someone from the WCJ called him to explain the terms of the work release program and arranged for Duggan to start working for Massad on work release.

62. Work Release Coordinator David Cardinal met with Massad to explain the rules and regulations of the work release program and had Massad sign the required paperwork for Duggan's work release. Cardinal could not recall calling Massad, but testified that it is possible he called Massad to set up the meeting.

63. Keddy testified that the time from when Duggan was committed to when he was approved for work release was "unusually quick." However, there may have been other instances when work release approval occurred within a similar timeframe.

64. Chappel, Keddy and Heenan all testified that they never talked to Glodis or to Special Sheriff Turco about any inmate classification, including Duggan's.

65. Director of Re-Entry Siergie testified that he never talked to Glodis or Turco about the Duggan matter.

66. Turco testified that he had no involvement in Duggan's classification. The management team at the WCJ was encouraged to make decisions, and the Classification Department generally made their own decisions without Turco's involvement.

67. Turco also testified that he never had any discussions with anyone about doing anything for Massad in 2009, and he never had any discussions with Glodis about Duggan in 2009.

68. Glodis testified that he never had any conversations with any member of the Sheriff's Office about Duggan before Duggan was approved for work release.

69. Glodis testified that he first heard about Duggan in February 2010, when a reporter called to ask questions about Duggan.

II. DISCUSSION

A. G.L. c. 268A, § 23(b)(2)(ii)

Section 23(b)(2) (ii) prohibits public employees from knowingly, or with reason to know, using or attempting to use their official positions to secure for themselves or others unwarranted privileges or

exemptions of substantial value which are not properly available to similarly situated individuals. In order to establish a violation of § 23(b)(2)(ii), Petitioner must prove by a preponderance of the evidence that:^[8] (1) Glodis was a state employee;^[9] (2) who knowingly or with reason to know used or attempted to use his official position; (3) to secure an unwarranted privilege or exemption^[10] for himself or others; (4) which was of substantial value;^[11] and (5) which was not properly available to similarly situated individuals.

We must first determine whether Glodis knowingly, or with reason to know, used or attempted to use his official position as Sheriff to: (1) explicitly direct one or more of his subordinates to place Duggan on work release or (2) implicitly direct one or more of his subordinates to place Duggan on work release by relaying Massad's request, while Glodis knew or had reason to know that under all of the circumstances, his subordinates would give that request preferential treatment.

Petitioner argues that an inference may be drawn that Glodis explicitly directed his subordinates to place Duggan on work release from the evidence that: (1) Massad called Glodis, and a day or two thereafter someone from the WCJ called Massad and told Massad that Duggan could be placed on work release, and (2) Duggan was expeditiously placed on work release the day after he was committed to the WCJ, despite being ineligible for the work release program pursuant to the WCJ written policy. Alternatively, Petitioner asserts that it may be inferred from the evidence that Glodis implicitly directed one or more of his subordinates to place Duggan on work release by relaying Massad's request to a subordinate while knowing, or having reason to know, that the subordinate would give the request preferential treatment. Respondent asserts that the evidence, including his own testimony, shows that he had no involvement in Duggan's work release placement and he did not discuss Duggan's classification with any WCSJ employees.

There is evidence in the record that Glodis received a telephone call from Massad concerning Duggan. However, there is no evidence that Glodis ever relayed this message to anyone at the WCJ.

Additionally, there is no evidence that Glodis participated in placing Duggan on work release. Heenan, Keddy and Chappel, the WCJ employees who were involved in recommending and approving Duggan's work release, all testified that they did not discuss Duggan's work release placement with either Glodis or Special Sheriff Turco. Based on the evidence in the record, we find that Petitioner has not met its burden of proving by a preponderance of the evidence that Glodis used or attempted to use his official position as Sheriff to direct one or more of his subordinates to place Duggan on work release. Because we have found that Petitioner has not proved this required element, Petitioner has not proved its case.

We also find that Petitioner has not met its burden of proving by a preponderance of the evidence that Glodis used his official position to obtain an unwarranted benefit or privilege for Massad or Duggan. The Commission has previously concluded that an "unwarranted privilege" is one that is "[l]acking adequate or official support" or "having no justification; groundless." See *EC-COI-98-2*. There is evidence that overcrowding at the WCJ was a major problem and affected classification decisions, including the decision to place inmates on work release. There is also evidence that the WCSJ employees who were involved in Duggan's classification and work release placement based their decision on the fact that Duggan's charges were non-violent in nature, the length of his sentence, the fact that he had been released on personal recognizance in the Westborough case, and the overcrowded conditions at WCJ. Given these facts we conclude that Duggan and Massad were not given an unwarranted privilege when Duggan was placed on work release.

Additionally, we find that Petitioner has not met its burden of proving by a preponderance of the evidence that work release was not available to inmates similarly situated to Duggan and to businessmen similarly situated to Massad. There is not sufficient evidence in the record to conclude that Massad was treated differently than similarly situated businessmen. The evidence shows that Glodis did not treat Massad any differently than he treated other members of the public who asked him for

information about inmates. Glodis testified that when Massad called him to ask whether Duggan could be placed on work release, Glodis gave Massad one of his standard responses that he gave to anyone who asked him for inmate information (i.e. "Hey, I'll get back to you," "Let me look into it," "I'll have somebody call you," and "I'm not sure. Let's follow up and have a conversation."). Additionally, there is not sufficient evidence to find that Duggan was treated differently than similarly situated inmates. Although Duggan's work release placement happened "unusually quick[ly]," there is evidence that other inmates may have been placed on work release within a similar timeframe. Further, although the written Policy states that an inmate with a pending case is not eligible for work release, the evidence indicates that the actual practice with respect to classification sometimes differed from the written Policy because of the need to comply with the Court's Consent Decree on over-crowding.

Accordingly, we find, that Petitioner has not proved by a preponderance of the evidence that Glodis knowingly or with reason to know used or attempted to use his official position to secure an unwarranted privilege for Duggan or Massad which was not properly available to similarly situated individuals. Therefore, we find that Petitioner has not proved by a preponderance of the evidence that Glodis violated § 23(b)(2)(ii) as alleged.

B. Section 23(b)(3)

Section 23(b)(3) prohibits a public employee from knowingly, or with reason to know, acting in a manner that would cause a reasonable person having knowledge of the relevant circumstances to conclude that any person could improperly influence or unduly enjoy his favor in the performance of his official duties, or that he was likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. Section 23(b)(3) further provides that "[i]t shall be unreasonable to so conclude if such . . . employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion." In order to establish a violation, Petitioner must prove by a

preponderance of the evidence that: (1) Glodis was a state employee; (2) who knowingly, or with reason to know, acted in a manner; (3) which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude; (4) that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

Petitioner argues that Glodis violated § 23(b)(3) as Sheriff by passing on Massad's request that Duggan be placed on work release, and Glodis did not avoid this violation by publicly disclosing that Massad was his friend and a contributor to his political campaigns. Petitioner offered no evidence that Glodis acted as Sheriff to place Duggan on work release. There is also no evidence that Glodis passed on Massad's request to place Duggan on work release. Three WCSO employees who were involved in Duggan's work release placement testified that they did not discuss Duggan's work release placement with Glodis. There was also testimony that Glodis was not involved in recommending and/or approving inmates for the work release program. Accordingly, we find that Petitioner has not proved that Glodis violated § 23(b)(3), as alleged.

III. ORDER

For the above stated reasons, we conclude that Petitioner has not proved by a preponderance of the evidence that Glodis violated G. L. c. 268A, §§ 23(b)(2) and 23(b)(3), as alleged. Accordingly, we conclude these proceedings by finding for Respondent.

DATE AUTHORIZED: March 27, 2013

DATE ISSUED: April 1, 2013

[1] Commissioner Murphy abstained from participating in this matter. Commissioner Quinlan was not present to vote on this matter.

[2] *930 CMR 1.01(10)(b)*.

[3] *930 CMR 1.01(10)(m)*.

[4] *930 CMR 1.01(10)(f)*.

[5] *G.L. c. 268B, § 4(i); 930 CMR 1.01(10)(o)(1)*.

[6] Telephone calls made to Turco's number at the WCJ were also directed to the main WCJ telephone line.

[7] Inmates who are eligible for COAP are released from the jail, but must wear an ankle bracelet.

[8] *930 CMR 1.01(o)(2)*.

[9] It is not disputed that Glodis was at all relevant times a state employee.

[10] The OTSC alleges that Glodis obtained an unwarranted privilege, not an unwarranted exemption. Accordingly, we address only the unwarranted privilege issue.

[11] For purposes of G.L. c. 268A, anything worth \$50 is of "substantial value." *930 CMR 5.05*.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 13-0006**

**IN THE MATTER OF
SHERMAN E. BRIGGS, JR.**

DISPOSITION AGREEMENT

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

On February 17, 2012, 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 Briggs. On July 20, 2012, the Commission concluded its inquiry and found reasonable cause to believe that Briggs violated G.L. c. 268A, §§ 19 and 17.

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

1. During the relevant time, Briggs was an appointed member of the Town of Marion Conservation Commission (“Conservation Commission”). Conservation Commission members are designated as special municipal employees for conflict of interest purposes. As such, Briggs was a special municipal employee as that term is defined in G.L. c. 268A, § 1(n).

2. Briggs owns and operates Sherman E. Briggs Excavating (“Briggs Excavating”), an unincorporated business.

3. For at least 20 years, Briggs Excavating has performed excavating work for Tabor Academy, a private high school in Marion.

4. Briggs, as owner and operator of Briggs Excavating, performed the excavation work for the installation of the utilities at Tabor Academy's Marine Science Center site many years ago.

5. In or about spring 2011, Tabor Academy needed to file a Notice of Intent with the Conservation Commission in order to obtain its approval for the installation of two 2,000-gallon saltwater tanks at Tabor Academy's Marine Science Center (the “Notice of Intent”).

6. Prior to filing the Notice of Intent, a Tabor Academy official met with Briggs, as owner and operator of Briggs Excavating, for Briggs’ assistance in determining how and where to install the concrete footings for the saltwater tanks.

7. On June 3, 2011, Tabor Academy filed the Notice of Intent.

8. On June 22, 2011, the Conservation Commission held a hearing regarding the Notice of Intent.

9. Briggs personally and substantially involved himself as a Conservation Commission member in the discussion at the June 22, 2011 hearing regarding the Notice of Intent and voted at that hearing to issue an Order of Conditions regarding the Notice of Intent (the “Order of Conditions”).

10. On June 27, 2011, the Conservation Commission issued the Order of Conditions, which allowed Tabor Academy to install the saltwater tanks.

11. Sometime after June 22, 2011, but before July 6, 2011, Tabor Academy hired Briggs Excavating to perform the excavation work needed for the installation of the saltwater tanks.

12. On or about July 6, 8, 14 and 15, 2011, Briggs, as owner and operator of Briggs Excavating, performed the excavation work needed for the saltwater tanks installation.

13. By invoice dated August 11, 2011, Briggs, through Briggs Excavating, billed Tabor Academy \$8,030 for the excavating and backfilling work performed for the saltwater tanks installation.

Conclusions of Law - Section 19

14. Except as otherwise permitted, § 19 of G.L. c. 268A, in relevant part, prohibits a municipal employee from participating^[1] as such an employee in a particular matter^[2] in which, to his knowledge, he has a financial interest.^[3]

15. The Order of Conditions was a particular matter.

16. Prior to participating at the June 22, 2011 hearing as described above: (1) Briggs Excavating had performed excavating work for Tabor Academy for at least 20 years; and (2) Briggs, through Briggs Excavating, had recently provided Tabor Academy with advice as to how and where to install the concrete footings for the saltwater tanks. Consequently, when, on June 22, 2011, Briggs participated in the decision to issue the Order of Conditions, he knew he had a reasonably foreseeable financial interest in the particular matter.

17. Accordingly, by participating as a Conservation Commission member in the decision to issue the Order of Conditions for the Tabor Academy saltwater tanks, a particular matter in which Briggs knew he had a reasonably foreseeable financial interest, Briggs violated § 19.

Conclusions of Law - Section 17(a)

18. 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 directly or indirectly receiving compensation from anyone other than the municipality in relation to a particular matter in which the municipality is a party or has a direct and substantial interest.

19. A special municipal employee is subject to § 17(a) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving.

20. As stated above, the decision to issue the Order of Conditions was a particular matter.

21. The Town of Marion, through the Conservation Commission, was a party to and/or had a direct and substantial interest in that particular matter.

22. As a special municipal employee, Briggs personally and substantially participated in the particular matter by discussing the Notice of Intent and voting to issue the Order of Conditions.

23. The excavating work needed for the installation of the saltwater tanks was in relation to the Order of Conditions.

24. By receiving \$8,030 from Tabor Academy in payment for the excavating and backfilling work performed for the installation of the saltwater tanks, Briggs received compensation from someone other than the Town of Marion in relation to a particular matter in which the Town of Marion was a party and/or had a direct and substantial interest.

25. This receipt of compensation was not otherwise than as provided by law for the proper discharge of Briggs' official Conservation Commission duties.

26. Accordingly, by receiving compensation from Tabor Academy in relation to the Order of Conditions, a particular matter in which the Town of Marion had a direct and substantial interest, Briggs violated § 17(a).

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

(1) that Briggs pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$7,500 as a civil penalty for violating G.L. c. 268A, §§ 19 and 17(a); and

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

DATE: May 2, 2013

[1] "Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. *G.L. c. 268A, § 1(j)*.

[2] "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. *G.L. c. 268A, § 1(k)*.

[3] "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 13-0004

IN THE MATTER OF
MICHAEL BYRNES

FINAL ORDER

On May 8, 2013, the parties filed a Joint Motion to Dismiss and requested that the Commission approve a Disposition Agreement. The Presiding Officer referred the matter to the full Commission for deliberation on May 17, 2013.

In the proposed Disposition Agreement, the Respondent admits that he violated G. L. c. 268B, § 5(g) by failing to file his Statement of Financial Interests within ten (10) days of receiving a Formal Notice of Lateness, but provided documentation of mitigating circumstances. The Respondent has agreed to pay the civil penalty of \$625 for the violation.

Accordingly, the Commission **ALLOWS** the Joint Motion to Dismiss. The Disposition Agreement is approved and this matter is hereby **DISMISSED**.

Date Authorized: May 17, 2012

Date Issued: May 23, 2013

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 13-0004

IN THE MATTER OF
MICHAEL BYRNES

DISPOSITION AGREEMENT

The State Ethics Commission and Michael Byrnes 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 26, 2012, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into a possible violation of G.L. c. 268B, by Byrnes. The Commission concluded its inquiry and, on January 18, 2013, found reasonable cause to believe that Byrnes violated G.L. c. 268B. On March 12, 2013, the Enforcement Division filed an Order to Show Cause initiating adjudicatory proceedings.

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

1. Byrnes, a resident of Melrose, served as the Executive Office of Labor and Workforce Development Division of Labor Director for more than 30 days in 2011. Byrnes is no longer serving as the Executive Office of Labor and Workforce Development Division of Labor Director.

2. As the Executive Office of Labor and Workforce Development Division of Labor Director, Byrnes was a state employee as that term is defined in G.L. c. 268A, § 1.

3. In accordance with G.L. c. 268B and 930 CMR 2.00, Byrnes' position of Executive Office of Labor and Workforce Development Division of Labor Director was designated as a major policy-making position for calendar year 2011. As such, Byrnes was required to file a Statement of Financial Interests ("SFI") for calendar year 2011 in accordance with G.L. c. 268B and 930 CMR 2.00.

4. Byrnes' SFI for 2011 was required to be filed by May 1, 2012, in accordance with G.L. c. 268B and 930 CMR 2.00. Byrnes was informed of his obligation to file an SFI for calendar year 2011.

5. Byrnes did not file an SFI on or before May 1, 2012. On May 8, 2012, the Commission sent by first class mail a Formal Notice of Lateness ("Notice") to Byrnes. The Notice advised Byrnes that his SFI had not been filed and was, therefore, delinquent. The Notice further advised Byrnes that failure to file his 2011 SFI within 10 days of receipt of the Notice

would result in the imposition of civil penalties. The Commission allows three days for receipt of the Notice if sent by first class mail. Therefore, Byrnes would not have incurred a civil penalty if he had filed his SFI by May 21, 2012.

6. Byrnes filed an SFI with the Commission on January 22, 2013.

7. Byrnes failed to timely file his SFI after receiving the Notice, and, therefore, violated G.L. c. 268B, § 5.

8. General Laws c. 268B, § 4 authorizes the Commission to impose a civil penalty of up to \$10,000 for each violation of c. 268B. The Commission has adopted the following civil penalty schedule for SFIs filed more than 10 days after the receipt of the Notice.

1-10 days late	\$100
11-20 days late	\$200
21-30 days late	\$300
31-40 days late	\$400
41-50 days late	\$500
51-60 days late	\$600
61-70 days late	\$700
71-80 days late	\$800
81-90 days late	\$900
91-100 days late	\$1,000
101- 110 days late	\$1,100
111-120 days late	\$1,200
121 days to the day before an Order to Show Cause is issued	\$1,250
The date an Order to Show Cause is issued to the day before a Decision and Order is issued by the Commission	\$2,500

The date a Decision and Order is issued by the Commission	Up to \$10,000
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9. Byrnes' SFI was 246 days late, and based on the Commission's fine schedule for late submission of an SFI, the civil penalty is \$1,250.

10. Byrnes provided documented mitigating circumstances^[1] that justify reducing the civil penalty to \$625.

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

a. that Byrnes pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$625 as a civil penalty for violating G.L. c. 268B, § 5; and

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

Date: May 29, 2013

^[1] Documented mitigating circumstances were provided under a protective order pursuant to 930 CMR 1.01(7)(f).

PUBLIC EDUCATION LETTER

BRIAN CONNORS

Brian Connors
 c/o Christopher G. Timson, Esq.
 Law Offices of Christopher G. Timson, P.C.
 89 Access Road, Suite 21
 Norwood, MA 02062

Re: Public Education Letter

Dear Mr. Connors:

As you know, the State Ethics Commission conducted a preliminary inquiry into whether you, in your capacity as a municipal employee, violated (1) section 19 of the conflict of interest law, G.L. c. 268A, by participating in crafting bid specifications for a school security equipment installation contract while planning to submit a bid for that contract through your private company, Flagship Security; and (2) section 20 of G.L. c. 268A, by repeatedly entering into contracts with the East Bridgewater Police Department through Flagship Security. Based on the staff's investigation, the Commission voted on January 18, 2013, to find reasonable cause to believe that you violated G.L. c. 268A, §§ 19 and 20.

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. In particular, you should be aware that the conflict of interest law broadly defines the term "municipal employee" and includes individuals who are performing services for, or holding a position within, a municipal agency, even if their duties are limited or ill-defined, and even if they are providing those services without compensation.

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.

Facts

You were a shareholder and president of Flagship Security Systems, Inc. ("Flagship Security"), a

corporation organized in May 2003 to install and repair security/fire/life safety systems, among other services.

In or about 2003, the then-East Bridgewater police chief appointed you as an East Bridgewater special police officer, an unpaid position. It is our understanding that individuals are appointed as special police officers for specific purposes, e.g., traffic direction, crossing guards, etc. The police chief who initially appointed you said he did so because you were repairing the Police Department radios through Flagship Security, and, as a special police officer, you could direct trespassers to leave the police radio tower.

The current police chief told us that since 2005, he has annually reappointed you as a special police officer so you would be covered by the town's insurance when you took cruisers home to repair the radios. Your last reappointment was in 2011. We are advised that as a special police officer, you had no shifts or assigned duties and wore neither a badge nor a uniform.

In or about 2007, you assisted the East Bridgewater Police Department in applying for a federal Secure Our Schools grant to install security equipment in local schools and the police station by providing equipment cost estimates. You indicated that you did not provide this assistance as a special police officer. You later provided information for incorporation into the bid specifications for a contract to install the security equipment while knowing that you intended to bid to on that contract through Flagship Security.

Invoices from Flagship Security to the East Bridgewater Police Department indicate that from 2008-2011, you repeatedly sold security-related equipment and services to the East Bridgewater Police Department under the Secure Our Schools grant. You told us that Flagship Security's gross earnings were about \$400,000 for these sales. In 2009, you sold goods and services totaling approximately \$15,000 to the East Bridgewater Police Department for the renovation of its dispatch area. As shareholder and president of Flagship Security, you received compensation from Flagship Security in relation to these transactions.

Legal Discussion

Municipal Employee

As a special police officer, you were a “municipal employee” as that term is defined in G.L. c. 268A, § 1(g), which states, in part, the following:

“Municipal Employee”, a person performing services for *or* holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis . . . *(emphasis added)*.

You do not need to be a full-time, paid municipal employee in order to be subject to the conflict of interest law. An individual appointed to a municipal position, paid or unpaid, with or without defined duties, is a municipal employee under the conflict of interest law. While it appears your duties as a special police officer were poorly defined, you were a municipal employee for the purposes of the conflict of interest law because you held an appointed position in the Town of East Bridgewater from 2003 through 2011. You were also a municipal employee because you performed services for the East Bridgewater Police Department by providing equipment cost estimates for the Secure Our Schools grant and by providing bid specification information for the equipment installation contract. Consequently, your conduct, as described above, raises concerns under §§ 19 and 20 of G.L. c. 268A.

Section 19

Section 19, in relevant part, prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he, or a business organization in which he is serving as officer, director, trustee, partner or employee, has a financial interest. A municipal employee may avoid violating § 19 if the municipal employee advises his appointing authority of the nature and circumstances of the particular matter, makes full disclosure of his financial interest, and receives an advance written determination from the appointing authority that the interest is not so substantial as to be deemed likely to

affect the integrity of the services which the municipality may expect from the employee.

The decision in or about 2007 to create bid specifications for the installation of security equipment under the Secure Our Schools grant was a particular matter. You participated as a municipal employee in that particular matter by providing information for incorporation into the bid specifications for the contract to install the security equipment. At the time you provided that information, you intended to bid on that contract through Flagship Security. Therefore, you participated as a municipal employee in a particular matter in which, to your knowledge, you had a financial interest, and the Commission found reasonable cause to believe that you violated § 19.

As an appointed municipal employee, you could have sought a § 19(b)(1) determination from the police chief, your appointing authority, which would have allowed your participation despite your financial interest. You did not do so.

Section 20

Section 20 prohibits a municipal employee from having a financial interest in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know.

As a special police officer, you were a municipal employee of the East Bridgewater Police Department. Flagship Security invoices indicate that from 2008-2011, you repeatedly sold goods and services to the East Bridgewater Police Department. You had a financial interest in those contracts between the East Bridgewater Police Department and Flagship Security. Therefore, the Commission found reasonable cause to believe you violated § 20.

You should be aware that Section 20 has several exemptions, although it does not appear that you were eligible for any of them. The only one that potentially could have applied to your situation was § 20(d), and that exemption would have applied only if the position of special police officer was designated as a “special municipal employee.” Section 20(d)

allows a special municipal employee to seek an exemption by filing a statement making full disclosure of his financial interest with the town clerk and obtaining Board of Selectmen approval of the exemption. That your special police officer position title had the word “special” in it did not make you a “special municipal employee” within the meaning of § 20(d). (You do not contend that you were misled by the use of the term “special” in your special police officer title into concluding that you were a special municipal employee.) Special municipal employee status for conflict of interest purposes can only be achieved by the Board of Selectman voting to classify all equivalent positions as special municipal positions. The East Bridgewater Board of Selectman has not classified special police officer positions as “special municipal employee” positions.

Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$10,000 for each violation.^[1] The Commission, however, has chosen to resolve this case with a Public Education Letter rather than by imposing a penalty because it believes the public interest would be best served by doing so. Public officials and employees should understand that individuals who perform services for a municipal agency or who serve in appointed unpaid municipal positions, including those with limited or ill-defined duties, are not exempt from the conflict of interest law. The purpose of this Public Education Letter is to emphasize that point.

Based upon its review of this matter, the Commission has determined that your receipt of this Public Education Letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

This matter is now closed.

DATE: June 3, 2013

^[1] A civil penalty of up to \$25,000 may be imposed for G.L. c. 268A, § 2 violations (bribes).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 13-0007**

**IN THE MATTER OF
PHILIP POLEY**

DISPOSITION AGREEMENT

The State Ethics Commission and Philip Poley 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 18, 2012, 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 Poley. The Commission has concluded its inquiry and, on September 21, 2012, found reasonable cause to believe that Poley violated G.L. c. 268A.

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

Findings of Fact

1. Poley, a former resident of Brookline, no longer resides in Massachusetts.
2. MassHealth, the Massachusetts Medicaid program, is a department of the Executive Office of Health and Human Services (“EOHHS”).
3. Poley was the chief operating officer (“COO”) for MassHealth from October 2007 until August 2010. Poley’s appointing authority was the EOHHS undersecretary.
4. Accenture is an international technology and business strategy consulting firm.
5. On August 17, 2009, Poley circulated a document within EOHHS entitled “MassHealth Analytics Unit.” The document (the “Analytics Proposal”) described Poley’s vision for the creation of a

MassHealth Analytics Unit (the “Analytics Unit”) for analyzing and managing Medicaid data.

6. On October 19, 2009, Poley shared a copy of his Analytics Proposal with Accenture’s Boston-based managing director (hereafter referred to as “Accenture Employee A”).^[1]

7. Accenture Employee A agreed to review the Analytics Proposal, and in turn forwarded the proposal to several Accenture colleagues.

8. At Poley’s request, on November 2, 2009, a colleague of Poley’s at MassHealth who had formerly worked for Accenture, emailed an Accenture executive in the firm’s health and public service practice (hereafter referred to as “Accenture Employee B”). In the email, Poley’s MassHealth colleague said that Poley was interested in having “a confidential conversation” with Accenture Employee B “to explore career alternatives.” Poley’s MassHealth colleague’s email stated, “I don’t want to facilitate [Poley’s] departure, but ... of all the folks I work with here, he would be the one I would pick for best potential fit for consulting.”

9. On November 17, 2009, at Poley’s request, Accenture representatives met with Poley at MassHealth to discuss analytics.

10. On November 21, 2009, Accenture Employee B replied to Poley’s MassHealth colleague saying that he would be glad to talk to Poley but would want to be “sensitive to talking about Accenture if he [Poley] is involved in any of our current/future work.” Poley’s MassHealth colleague forwarded Accenture Employee B’s email to Poley on November 23, 2009.

11. On November 23, 2009, a manager in Accenture’s public service strategy practice (hereafter referred to as “Accenture Employee C”) sent an email to several Accenture colleagues regarding the November 17, 2009 meeting with MassHealth. In the email, Accenture Employee C stated that MassHealth wanted to outsource the creation of the proposed Analytics Unit to the UMass Medical School (“UMass”). In the email, Accenture Employee C stated that UMass would then “contract directly with Accenture” on how to create the organization.

12. In December 2009, UMass appointed a project manager to oversee its role in the planning of the Analytics Unit.

13. On December 10, 2009, using his personal email account, Poley sent Accenture Employee B a copy of his resume. In the email, Poley stated, “I am mindful of the points you raise regarding conflict of interest.” Poley further stated that he was involved in “a project [the Analytics Unit] that may result in work for Accenture” and thus it would not be appropriate “to discuss specific opportunities at Accenture” since Poley was, as he stated in the email, “a key player in the project.”

14. Poley and Accenture Employee B spoke by telephone on February 1, 2010. Poley stated under oath that, during the conversation, he did not express a desire to pursue employment with Accenture, nor did the two discuss business opportunities for Accenture with the Commonwealth. Poley characterized the conversation, which lasted about 15 minutes, as a “general conversation” about the consulting field.

15. Over the following months, Poley continued to be involved in creating the Analytics Unit and was in periodic contact with Accenture executives regarding the project.

16. On February 26, 2010, the UMass project manager for the Analytics Unit emailed Accenture Employee C. The UMass project manager said that Poley had suggested contacting Accenture Employee C to see “what if any resources Accenture might provide” as UMass produces project scoping documents” for the Analytics Unit.

17. On February 26, 2010, using his MassHealth email account, Poley sent his resume to Accenture Employee C, along with a note: “In case you are interested.”

18. According to Accenture Employee C, he (Accenture Employee C) did not have the authority to make a hiring decision involving someone at Poley’s experience level. Accenture Employee C’s role, as he saw it, was to “orchestrate the process.”

19. On February 26, 2010, Accenture Employee C forwarded Poley's email to an executive in Accenture's public health practice (hereafter referred to as "Accenture Employee D") with the words, "See attached." Accenture Employee D did not immediately follow up with Poley.

20. On March 4, 2010, Poley emailed UMass and MassHealth staff involved in the planning and creation of the Analytics Unit (the "Analytics Project"), asking their opinion regarding the Analytics Project planning document entitled the "Draft Project Statement." Poley was listed in the document as the executive sponsor of the Analytics Project.

21. On March 23, 2010, Accenture Employee C forwarded Poley's resume to other Accenture executives, noting that Poley was a "prospective hire from Massachusetts."

22. On April 9, 2010, Accenture made a presentation to MassHealth and UMass about "best practices" in the field of analytics. Poley attended this presentation.

23. On the morning of Saturday, April 24, 2010, Accenture Employee C emailed several Accenture colleagues to provide "an update on where things stand with MassHealth Analytics." According to the email, Poley and the EOHHS undersecretary would soon be meeting to "decide on procurement, approach, budget, etc. [regarding the Analytics Project.]"

24. On April 24, 2010, Accenture Employee C received an email from Poley asking Accenture Employee C to call. "I'd like to continue our conversation from yesterday," wrote Poley, using his MassHealth email account.

25. Neither Poley nor Accenture Employee C could recall the substance of the Friday, April 23, 2010 "conversation" referred to in Poley's email. Both, however, confirmed that they spoke by phone the next day on Saturday, April 24, 2010. During that conversation, Poley indicated that he was looking for a job. Poley and Accenture Employee C discussed issues such as Poley's potential title at Accenture, as well as work assignments and compensation.

Accenture Employee C explained to Poley that if Accenture were interested in further pursuing Poley as a potential hire, the next discussions would be with people more senior than Accenture Employee C.

26. In the early afternoon of April 24, 2010, using his MassHealth email account, Poley emailed Accenture Employee C to thank him for that morning's conversation, saying to Accenture Employee C that Poley was "looking forward to taking it to the next level."

27. At a health information technology conference held in Boston from April 29-30, 2010, Poley and Accenture Employee D (the executive in Accenture's public health practice) had an approximately 15-minute conversation that had been suggested by Accenture Employee C. During the meeting, Poley asked Employee D questions about her experience working at Accenture. Employee D described the conversation as networking.

28. On May 4, 2010, Poley used his MassHealth email account to contact Accenture Employee D and thank her for her time at the conference. "It is clear that you find the work rewarding and engaging and it is good to know that you have not become bored in your years with Accenture—a great commentary on both you and your employer," wrote Poley.

29. In the first week of May 2010, Poley asked the UMass project manager for the Analytics Project to set up a meeting with Poley and the EOHHS undersecretary to report on the status of the Analytics Project. The meeting, which was the first of three so-called "proof of concept" meetings, was held May 7, 2010.^[2] As the Analytics Project executive sponsor, Poley was substantially involved at the meeting, as well as the follow-up meetings held May 12, 2010 and May 26, 2010. At the conclusion of the series of meetings, the participants decided that, to move forward with the Analytics Project, they would need the assistance of a consulting firm.

30. On June 2, 2010, Accenture Employee C emailed Poley and asked him to complete Accenture's conflict of interest form, entitled "Current or Former U.S. Government Employees Checklist." Poley returned the completed form to Accenture Employee C on June 4, 2010. Among the questions on the

checklist was whether Accenture had any “interests that may be affected by your actions or by your agency.” Poley responded that Accenture does not have any “active contracts” with MassHealth, but that Poley was “executive sponsor” of an initiative between MassHealth and UMass in which UMass would be the contracting agency and Accenture was a potential consultant.

31. On June 24, 2010, Accenture Employee D (the executive in Accenture’s public health practice) informed Poley that Poley had cleared the checklist and would begin the interview process.

32. On June 25, 2010, Poley emailed Accenture Employee D from his MassHealth account, thanking her for the conversation they had the day before. In the email, Poley asked Accenture Employee D to “commit to an interview process with Accenture that can be concluded and brought to the offer stage within 10-14 days.”

33. On June 29, 2010, Poley and Accenture Employee D traded emails to set up phone interviews of Poley with four Accenture executives. The interviews took place between July 1, 2010 and July 8, 2010.

34. Also on June 29, 2010, Poley submitted a letter to the EOHHS undersecretary (with a copy to the State Ethics Commission) disclosing Poley’s and Accenture’s “mutual desire to explore a substantive conversation regarding employment prospects.” In the letter, Poley wrote that he was making the disclosure because of his past role as “MassHealth executive sponsor” of the Analytics Project. Poley’s letter stated that Poley would suspend his involvement in the Analytics Project until the EOHHS undersecretary made a determination regarding Poley’s ongoing involvement.

35. Upon receiving Poley’s disclosure, the EOHHS undersecretary ended Poley’s involvement in the Analytics Project.

36. On July 5, 2010, UMass emailed a solicitation to Accenture Employee C for a proposal to provide management consultant services on the “MassHealth Analytics Unit Construction, Governance, Process” project. The consultant services contemplated (the

“Analytics Contract”) were essential to the creation of the Analytics Unit. No other company was solicited for a proposal for the Analytics Contract. On July 15, 2010, Poley accepted an offer of employment with Accenture as Senior Manager, Health and Public Service Operating Group. Poley’s starting salary at Accenture was: \$185,000, with the possibility of earning additional pay through performance bonuses.

37. On July 20, 2010, Accenture Employee C submitted Accenture’s consulting services proposal in response to the UMass solicitation regarding the Analytics Project. Accenture estimated that the cost of its services for the six-month project would be \$961,570.

38. Between July 2010 and October 2010, UMass and Accenture negotiated the terms of the Analytics Contract.

39. On November 2, 2010, Accenture signed a \$420,000 consulting services contract with UMass regarding the Analytics Contract.

40. Poley’s last day of employment with MassHealth was August 12, 2010.

41. Poley began working for Accenture on September 16, 2010.

42. Poley’s primary responsibilities as an Accenture employee did not include performing work regarding the Analytics Contract. However, on a number of occasions between September 2010 and November 15, 2010, Poley provided insight and advice to his Accenture colleagues in connection with the contemplated Analytics Contract, and after November 2, 2010, the Analytics Contract that was awarded. These actions included reviewing in October 2010 Accenture’s “draft scope of work” for the Analytics Contract; providing coaching and guidance on a “MassHealth Kick Off” presentation in October 2010 for the Analytics Contract; emailing comments to Accenture Employee C on October 14, 2010, regarding a survey prepared by Accenture for the Analytics Project; emailing Accenture Employee C on October 25, 2010, with advice regarding communications with MassHealth; and, on November 15, 2010, reviewing and providing

comments on a planned presentation called “MassHealth Analytics Midterm Workshop.”

Conclusions of Law

43. As the COO for MassHealth, Poley was at all times relevant to this matter a “state employee” as defined in G.L. c. 268A, § 1.

Section 23(b)(3)

44. Section 23(b)(3) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. The section further provides that it shall be unreasonable to so conclude if such employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion.

45. From November 2009 to June 29, 2010, by taking the above-described actions in his capacity as the MassHealth COO in connection with the Analytics Project, a matter of interest to Accenture, while actively seeking future private employment with Accenture, Poley 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 Accenture could unduly enjoy Poley’s favor in the performance of his official duties. Poley did not timely file any § 23(b)(3) disclosures to dispel this appearance of impropriety. Therefore, in so acting, Poley repeatedly violated § 23(b)(3).

Section 6

46. Except as the section otherwise permits, G.L. c. 268A, § 6 prohibits in relevant part a state employee from participating in a particular matter in which to his knowledge an organization with which he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

47. The ongoing determination as to whether to create an Analytics Unit was a particular matter.

48. Accenture had a reasonably foreseeable financial interest in this particular matter in that as early as October 2009 it was interested in seeking and did subsequently secure the consulting contract which would be needed to create the Analytics Unit.

49. Poley began negotiating for prospective employment^[3] with Accenture as early as Friday, April 23, and Saturday, April 24, 2010, the dates on which he had discussions with a senior Accenture employee concerning Poley’s title, potential work assignments and compensation at Accenture, which topics reflected the mutuality of interest between Poley and Accenture. Poley had previously emailed his resume to Accenture in December 2009.

50. Poley participated in the creation of the Analytics Unit after April 24, 2010, by continuing to be the executive sponsor of the Analytics Project and by his significant involvement in the May 2010 proof of concept meetings.

51. Therefore, by his actions as the COO for MassHealth as described above, Poley participated as a state employee in a particular matter in which to his knowledge Accenture, a business organization with whom he was negotiating for prospective employment, had a financial interest. Each time he did so, Poley violated G.L. c. 268A, § 6.

52. According to Poley, he believed that he could seek employment with Accenture while at MassHealth because UMass, without Poley’s involvement, would award the Analytics Contract. Poley was mistaken in this belief. As discussed above, the ongoing determination as to whether to create an Analytics Unit involved various stages, but was one integrated particular matter. Consequently, once Poley began negotiating for employment with Accenture, he was precluded by § 6 from participating as a Mass Health employee in that particular matter, including being involved in any stage of the determination to create the Analytics Unit occurring prior to the award of the Analytics Contract.

Section 5(a)

53. Section 5(a) of G.L. c. 268A prohibits a former state employee from receiving compensation directly or indirectly from anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest, and in which he participated as a state employee while so employed.

54. Poley became a former state employee when he left his position as the MassHealth COO on August 12, 2010.

55. The determination as to whether to create an Analytics Unit was a particular matter.

56. The Commonwealth, as well as MassHealth, were both parties to and had a direct and substantial interest in the determination as to whether to create the Analytics Unit.

57. Poley participated as the MassHealth COO in the decision to create the Analytics Unit.

58. Between September 2010 and November 2010, Poley worked as an Accenture employee on the Analytics Contract, providing insight and advice to other Accenture employees working on the Analytics Contract. Poley received compensation for this work from Accenture.

59. Poley's work on the Analytics Contract was in connection with the same particular matter in which he had participated as a MassHealth employee, i.e., the decision to create the Analytics Unit, since the Analytics Contract was essential to the planning and ultimate construction of the Analytics Unit.

60. By receiving compensation from Accenture for his guidance and advice to the Accenture employees working on the proposed or awarded Analytics Contract, Poley received compensation from someone other than the Commonwealth in connection with a particular matter in which the Commonwealth or a state agency was a party and/or had a direct and substantial interest, and in which matter Poley had participated as a state employee. Therefore, Poley repeatedly violated § 5(a).

In view of the foregoing violations of G.L. c. 268A by Poley, the Commission has determined that the

public interest would be served by the disposition of this matter without further enforcement proceedings, based on the following terms and conditions agreed to by Poley:

a. that Poley pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$25,000 as a civil penalty for repeatedly violating G.L. c. 268A, §§ 5(a), 6 and 23(b)(3); and

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

DATE: June 5, 2013

^[1] The names of Accenture employees have not been included as they are not parties to this action.

^[2] The purpose of the "proof of concept" meetings was to address questions raised by the EOHHS undersecretary as well as to provide him with a status report on the project.

^[3] The key operating principle is mutuality of interest. Where a public employee and a person or organization have scheduled a meeting to discuss the availability of a position and the employee's qualifications for that position, the employee will be regarded as negotiating for prospective employment with that person or organization. See *EC-COI-82-8* (where an employee affirmatively responds to an inquiry from a prospective employer and meets with the employer, the employee is negotiating for future employment). Where there is a mutuality of interest between a public employee and a prospective employer for a particular position, the employee's loyalty may become divided between the public interest and personal interest when dealing with matters affecting the prospective employer's financial interests. In such situations, the employee must abstain from participating in these matters unless and until the employee receives from his or her appointing official written permission to participate.

Municipal Building Study Committee (“the Committee”) to look into whether the Town could afford to buy a building to be used as its town hall, and to develop specifications for a Request for Proposals (“RFP”) to identify a suitable building the Town could purchase for that purpose.

5. In 2009, O’Brien became a member of the Committee.

6. The Committee, including O’Brien, met with an architect who determined that the town needed a town hall with at least 12,000 square feet of space in order to accommodate the Town’s offices.

7. In 2010, the Committee, including O’Brien, gave the specifications to the BOS for it to use in drafting an RFP. In or around spring 2010, the BOS, including O’Brien, drafted, voted upon and issued the RFP to identify a suitable building within the Town that the Town could purchase containing at least 12,000 square feet.

8. The Town received four responses to the RFP proposing buildings for sale that were potential sites for the town hall, including the Building, which was exactly 12,000 square feet.

9. Of the four responses to the RFP, the only one that met the RFP’s specifications was the one that proposed the Building.

10. The Committee, including O’Brien, voted to recommend at the 2010 Town Meeting that the Town purchase the Building.

11. The 2010 Town Meeting approved the purchase of the Building, and the Town, through the BOS, eventually purchased the Building, with the deed being transferred to the Town on November 1, 2010.

12. As a member of the BOS, O’Brien signed several of the required purchase and sale documents regarding the Building, including, but not limited to, the acceptance of the deed, and O’Brien voted to authorize payment of roughly \$400,000 for the Building.

13. The Town planned to renovate the Building’s interior and improve the look of the Building’s exterior.

14. O’Brien never disclosed formally or informally to the Committee or to the BOS that the O’Brien Family Home was directly across the street from the Building. However, according to O’Brien and the Committee chairman, who was also the BOS chairman, the Committee members and the BOS members knew that the Building was across the street from the O’Brien Family Home.

15. The Town, for financial reasons, never renovated the Building, or moved the Town’s offices into the Building. The Town is currently in the process of selling the Building. The Building has remained vacant since 2009.

Conclusions of Law

Section 19

16. Except as otherwise permitted,^[1] § 19 of G.L. c. 268A prohibits a municipal employee from participating^[2] as such an employee in a particular matter^[3] in which, to his knowledge, he or an immediate family member^[4] has a financial interest.^[5]

17. As a Selectman and as a Committee member, O’Brien was a municipal employee within the meaning of § 19.

18. The Town’s decision to acquire an existing building to use as its town hall was a particular matter.

19. O’Brien participated as a municipal employee in the Town’s decision to acquire an existing building to use as its town hall, as a Committee member and/or as a Selectman, by: (1) drafting the RFP specifications; (2) voting upon and issuing the RFP; (3) voting to recommend the purchase of the Building by the Town at Town Meeting; and (4) signing the purchase and sale transaction paperwork.

20. Because it is located directly across the street from the O’Brien Family Home, the Building is an abutting property to the O’Brien Family Home.^[6]

21. The Commission will presume that a property owner has a financial interest in matters affecting abutting property unless the property owner rebuts the presumption with competent evidence, showing that the matter will not affect the property owner’s

financial interest.^[7] O'Brien failed to provide any evidence to rebut this presumption.

22. Moreover, O'Brien knew that he and his wife as holders of a life estate in the O'Brien Family Home, and his three adult children as beneficiaries of the Trust, had a financial interest in the town's 2010 purchase of the Building because he knew that the renovation and improvement of the empty former factory building across the street from the O'Brien Family Home for use as a town hall would affect the value of the O'Brien Family Home. Given O'Brien's description of the Building as an "eyesore," it is evident that O'Brien and/or his immediate family had a positive financial interest in the Town's decision to purchase, renovate and improve the Building, which would eliminate the existing eyesore directly across the street from the O'Brien Family Home and positively affect the value of the O'Brien Family Home.

23. Even if, as O'Brien claimed, the impact of the Town's decision on the value of the O'Brien Family Home would be a negative one due to the amount of traffic a town hall would bring to his neighborhood, O'Brien still knew that he and/or his immediate family had a financial interest in the Town's decision to buy and renovate the building. The Commission has found that a negative financial interest is a financial interest for § 19 purposes.

24. Therefore, at the time of his participation in the Town's decision to purchase and renovate an existing building for use as its town hall, O'Brien knew that he and/or his immediate family members had a financial interest in that decision.

25. Accordingly, by, as described above, participating as a Committee member and/or Selectman in a particular matter in which he knew that he, his wife and/or their three adult children had a financial interest, O'Brien violated § 19.

Resolution

In view of the foregoing violation of G.L. c. 268A by O'Brien, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings,

on the basis of the following terms and conditions agreed to by O'Brien:

(1) that O'Brien pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, § 19; and

(2) that O'Brien 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: July 25, 2013

[1] None of the exemptions applies.

[2] "Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. *G.L. c. 268A, § 1(j)*.

[3] "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. *G.L. c. 268A, § 1(k)*.

[4] "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters. *G.L. c. 268A, § 1(e)*.

[5] "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-*

84-98. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

^[6] *Commission Advisory 05-02: Voting on Matters Affecting Abutting or Nearby Property*, considers property that is directly across the street from a property to be abutting property.

^[7] See *Commission Advisory 05-02*.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 13-0002**

**IN THE MATTER OF
ALGIRD SUNSKIS**

**RULING ON JOINT MOTION AND ORDER OF
DISMISSAL**

On July 26, 2013, Petitioner and Respondent jointly moved to dismiss these adjudicatory proceedings pursuant to 930 CMR 1.01(6)(a). For the reasons stated in the Joint Motion to Dismiss, the motion is **GRANTED**, and these adjudicatory proceedings are **DISMISSED**.

DATE AUTHORIZED: August 2, 2013

DATE ISSUED: August 21, 2013

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 12-0011**

**IN THE MATTER OF
RICHARD MCCLURE**

DECISION AND ORDER

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Richard McClure, Esq.
Counsel for Respondent

Commissioners: Charles B. Swartwood, III, Ch.
Paula Finley Mangum
Martin F. Murphy
William J. Trach^[1]

Presiding Officer: Commissioner Paula Finley
Mangum

Introduction

This matter concerns allegations that Respondent Richard McClure violated the conflict of interest law, G. L. c. 268A, §17(c),^[2] by, while serving as a Town of Chelmsford (“Chelmsford” or “Town”) Planning Board member, acting as attorney for clients who were not the Town or an agency of the Town in connection with two separate lawsuits (the “Recall Lawsuit” and the “Fair Street Lawsuit”) in which the Town was a party and/or had a direct and substantial interest.

Procedural Background

This matter began on September 19, 2012, with Petitioner’s issuance of an Order to Show Cause alleging that McClure violated G. L. c. 268A, § 17(c) in 2011. McClure answered on October 10, 2012, denying many of the allegations and that he had violated § 17(c). On November 6, 2012, McClure filed an Amended Answer. McClure did not plead any affirmative defenses. On January 31, 2013, the adjudicatory hearing in this matter was held before Commissioner Mangum. By agreement of the Parties, 47 exhibits were admitted into evidence. The Parties also entered into Stipulations of Fact and Law. Both Parties made opening statements. Petitioner rested without calling any witnesses. McClure testified as his sole witness and was cross-examined by Petitioner. On March 6th, the Parties filed their briefs. The Parties made their closing statements before the State Ethics Commission (“Commission”) at the Commission’s June 28, 2013 meeting.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony of the witness at the

adjudicatory hearing, the evidence in the public record and the arguments of the parties.

Findings of Fact

1. McClure is an attorney with a private sole practice in Chelmsford, where he is a longtime resident. McClure has been a practicing attorney for about twenty years.

2. On April 5, 2011, McClure was elected to the Chelmsford Planning Board. On April 13, 2011, McClure was sworn into office as a Planning Board member by the Town Clerk, received a large packet of printed materials from the Town Clerk and signed an acknowledgement of his receipt of a summary of the conflict of interest law for municipal employees.^[3] McClure did not read the materials at that time. McClure remained a Planning Board member during all periods after April 5, 2011 relevant to these proceedings.

The Recall Lawsuit

3. On or about April 21, 2011, McClure, acting as a private attorney for private individuals, sent a letter on his legal practice stationery to the Chelmsford Town Clerk (“Town Clerk”) stating that he represented several registered voters of the Town with regard to an effort to recall the Chelmsford Board of Selectmen (“Board of Selectmen”). In the letter, McClure disputed the Town Clerk’s interpretation of the Town Charter regarding the deadline for returning signed recall petitions and demanded a written acknowledgement from the Town Clerk supporting McClure’s interpretation of the Town Charter. McClure indicated in the letter that, absent such an acknowledgement, he would “have no choice but to file a complaint for relief.”

4. On April 22, 2011, McClure, acting as a private attorney for private individuals, filed suit against the Town Clerk, as such, in Middlesex Superior Court (“the Recall Lawsuit”), challenging the Town Clerk’s interpretation of the Town Charter sections regarding the procedure for initiating a recall election of the Town selectmen. The complaint listed ten named plaintiffs (McClure not among them) and referenced an additional, unnamed 328 voters of the Town and was signed by McClure as plaintiffs’ attorney. The

Recall Lawsuit sought certiorari, mandamus, declaratory judgment and preliminary injunctive relief. Also on April 22, 2011, McClure filed Plaintiffs’ Emergency Motion for Preliminary Injunctive Relief which he had signed as plaintiffs’ attorney. The emergency motion sought a temporary restraining order prohibiting the Town Clerk from refusing to accept the filing of recall petitions prior to a certain date.

5. A hearing on Plaintiffs’ emergency motion was held on April 22nd and McClure appeared on behalf of the plaintiffs. Chelmsford Town Counsel (“Town Counsel”) appeared on behalf of the Town Clerk and in opposition to plaintiffs’ motion. Just prior to the start of the April 22nd hearing, Town Counsel informed McClure of his opinion that McClure’s involvement in the Recall Lawsuit as private counsel violated the conflict of interest law given that McClure was a Planning Board member. McClure told Town Counsel that he disagreed with his interpretation of the law, and proceeded to represent the plaintiffs at the hearing by arguing for the motion for preliminary injunctive relief. The conflict of interest law issue was not raised at the hearing. The court granted plaintiffs’ motion and preliminarily enjoined the Town Clerk from refusing to accept recall petitions with respect to selectmen returned and filed with the Town Clerk before the close of business on May 6, 2011, in the manner provided for in the Town Charter.

6. On April 26, 2011, acting as plaintiffs’ attorney, McClure faxed a letter on his law practice stationery to an assistant clerk of the Superior Court in Lowell advising that he would “be appearing in your session at 3:30 p.m. requesting to be heard on plaintiffs’ emergency motion for preliminary injunctive relief” in the Recall Lawsuit and setting forth his arguments in support of the motion, which concerned the Town Clerk’s alleged failure to provide sufficient “petition blanks” to plaintiffs. On the same date, acting as plaintiffs’ attorney, McClure filed Plaintiffs’ Emergency Motion for Further Injunctive Relief, which he alone signed and submitted with a named plaintiff as “Plaintiffs.” McClure also signed the motion a second time over his address and B.B.O. number and signed the certificate of service. The motion sought a temporary restraining order

prohibiting the Town Clerk from refusing to accept for filing “exact copies” of the petition blanks previously issued by her to plaintiffs.

7. Also on April 26, 2011, acting as plaintiffs’ attorney, McClure filed Plaintiffs’ First Amended Petition for Certiorari, Petition for Writ of Mandamus, Complaint for Declaratory Judgment and Preliminary Injunctive Relief (the “First Amended Complaint”). The First Amended Complaint concerned the Town Clerk’s alleged failure to issue sufficient recall petition blanks to plaintiffs and to allow the plaintiffs to reproduce exact copies of the blanks issued by her. McClure, the sole signer, signed the First Amended Complaint “Richard P. McClure, Esquire Plaintiff Pro Se.” The caption of both the April 26th emergency motion and the First Amended Complaint included McClure among the named plaintiffs. The motion has “Richard P. McClure,” the name of another plaintiff and “Plaintiffs” below McClure’s signature and the amended complaint has “Richard P. McClure, Esq. Plaintiff Pro Se” under his signature.^[4] McClure’s B.B.O. number was printed at the bottom of the signature page beneath his name and McClure signed the certificate of service.

8. Additionally on April 26, 2011, McClure, acting as plaintiffs’ attorney, emailed Town Manager Paul Cohen regarding the plaintiffs’ emergency motion for further injunctive relief stating, “I implore you not to waste anymore taxpayers’ money in frivolous defense of this action. There is zero harm to the town in allowing petitioners to make “exact copy” petitions and case law supports it. Conversely, plaintiffs will suffer irreparable harm by the town clerk’s failure to issue sufficient recall petitions. If the clerk will agree, in writing, to be subject to the exact copy statutes, I will withdraw said emergency motion.”

9. By letter dated April 26, 2013, Town Counsel, citing and quoting G. L. c. 268A, §17(c), cautioned McClure that his representation of the plaintiffs in the Recall Lawsuit “is a clear and undeniable violation of the Conflict of Interest Law.” Town Counsel referenced and enclosed with the letter a copy of a purported complaint to the Commission concerning McClure. Town Counsel further stated that the Town Clerk was willing, “in order to minimize the

additional burden and expense,” to abide by the “exact copy” rule as set forth in G. L. c. 53, §§ 22a and 47.

10. McClure could have ended the conflict of interest created by his acting as attorney for the plaintiffs in the Recall Lawsuit by either withdrawing as plaintiffs’ counsel or resigning from the Planning Board. McClure did neither.

11. On April 27, 2011, McClure, as plaintiffs’ attorney, in a faxed letter on his law practice stationery to an assistant clerk of the superior court in Woburn, informed the court that the parties had settled the matter relating to the April 26th emergency motion for injunctive relief, requested the cancellation of the hearing scheduled for that date and, “[o]n behalf of counsel,” thanked the assistant clerk for her assistance.

12. On April 29, 2011, McClure, as plaintiffs’ attorney, by faxed letter on his law practice stationery to an assistant clerk of the superior court in Woburn, informed the court regarding the Recall Lawsuit that “a third issue has arisen that requires that I appear in your session on Monday, May 2, 2011 at 2 p.m. requesting to be heard on plaintiffs’ emergency motion for further injunctive relief,” and that he “expects to hand-deliver the pleadings later this afternoon.”

13. According to McClure’s affidavit referred to *infra*, he printed and signed the name of another attorney, who, McClure testified at the adjudicatory hearing, had, on or about April 28th, agreed to represent the other plaintiffs in the lawsuit, “at the bottom of plaintiffs’ second amended complaint on behalf of [the plaintiffs]” and that this representation, along with his representation of himself as plaintiff *pro se*, was also on the emergency motion for further injunctive relief which was to be heard on May 2nd.^[5] (The second amended complaint and the motion are not in evidence, and the other attorney did not testify.) McClure did not withdraw his appearance as plaintiffs’ attorney. In any case, plaintiffs’ emergency motion for further injunctive relief was argued at hearing on May 2nd or May 3rd by McClure as plaintiffs’ attorney,^[6] and the court granted the motion. The Town Clerk moved on or

about May 3rd to dissolve the temporary restraining order; and the Court granted the motion and scheduled the matter for a further hearing on May 5th.

14. Sometime on or before May 5, 2011, the Town Clerk moved to disqualify McClure as plaintiffs' counsel in substantial part because of the conflict of interest created by his position as an elected official of the Town, and for sanctions. On or about May 5, 2011, McClure filed his affidavit in opposition to the Town Clerk's motion. McClure and Town Counsel appeared in court on May 5th for a hearing on both Plaintiffs' Emergency Motion for Further Injunctive Relief and defendant's emergency motion to disqualify McClure as plaintiffs' counsel and for sanctions. A new attorney for the plaintiffs other than McClure also appeared at the hearing. The record is unclear as to the roles McClure and the new attorney played at the May 5th hearing, except that McClure objected to the motion to disqualify him and the parties have stipulated the motion for further injunctive relief was "brought by McClure".

15. By order dated May 5, 2011, and entered May 6th, the court denied plaintiffs' motion for further injunctive relief. The court allowed defendant's motion to disqualify McClure and disqualified him from representing any party other than himself in the Recall Lawsuit. The court also ordered all pleadings filed by McClure as the attorney for other plaintiffs stricken and denied the defendant's request for sanctions. The court also denied Plaintiffs' Emergency Motion to Amend First Amended Complaint and struck the First Amended Complaint because it was signed by McClure both as a pro se party and as attorney, and no other attorney for plaintiffs was named in or signed it. McClure unsuccessfully attempted to appeal his disqualification as plaintiffs' counsel by filing a G. L. c. 231, § 118 petition in the Appeals Court.

16. McClure was not compensated for his private legal work in the Recall Lawsuit.

The Fair Street Lawsuit

17. In August 2010, McClure, acting as a private attorney for four Chelmsford residents, filed a lawsuit in Land Court ("the Fair Street Lawsuit"). In the

lawsuit, the four plaintiffs (two neighboring couples) sought to prevent the defendant owners of an abutting parcel (the "Kohls") from using a Town-owned "paper street" (i.e., a street shown on the subdivision plan, but never constructed) running between the plaintiffs' neighboring parcels to access their parcel and to establish the plaintiffs' ownership of the paper street land. In October 2010, McClure filed an amended complaint making the Town a defendant in the Fair Street lawsuit and alleging that the Town had abandoned any rights it had in the paper street, with the exception of sewer easements, and that the plaintiffs were the rightful owners of the paper street land between their respective lots. Among other things, the lawsuit alleged that the Town unlawfully took by eminent domain an easement on Fair Street.

18. By letter dated May 24, 2011, Town Counsel, writing in regard to McClure's representation of the plaintiffs in the Fair Street Lawsuit, admonished McClure that, since his election to the Planning Board, McClure "may not appear as attorney on behalf of any party in litigation in which the Town is a party," and that his doing so violated G. L. c. 268A, § 17(c). Town Counsel requested that McClure provide him with notice of his withdrawal as counsel for the plaintiffs in the Fair Street Lawsuit and the identity of successor counsel.

19. McClure could have ended the conflict of interest created by his acting as attorney for the plaintiffs in the Fair Street Lawsuit by either withdrawing as plaintiffs' counsel or resigning from the Planning Board. McClure did not resign from the Planning Board and did not withdraw as attorney for the plaintiffs in the Fair Street Lawsuit until ordered by the court to do so.

20. On June 8, 2011, McClure emailed his clients stating in relevant part, "I 'disagree' with them demanding my withdrawal as the matter can be rectified by 'withdrawing' your claim against the town... HOWEVER, the town is correct in saying that it violates ethics laws for me to continue to represent you in a claim against the town. I suggest that the more practical approach would be to dismiss [sic] claim against the town and continue to represent you against Kohl [sic]. The alternative would be to retain another attorney to represent you in the

existing action, which I do not believe is cost effective at this point.” According to McClure, his clients agreed to drop their claims against the Town. McClure did not offer to resolve the conflict by resigning from the Planning Board.

21. McClure attempted to eliminate his conflict of interest by, as plaintiffs’ counsel, seeking to have the Town dropped as a party to the Fair Street lawsuit. On or about June 21, 2011, McClure proposed to Town Counsel and counsel for the Kohls a stipulation of dismissal without prejudice of the Town as a defendant in the lawsuit.

22. The Town had no objection to being dismissed as a defendant from the Fair Street Lawsuit. The Town’s co-defendants, the Kohls, however, objected to having the Town removed from the lawsuit. By email on June 21, 2011, the Kohls’ attorney told McClure, “The Town is a necessary party to the lawsuit and you must either dismiss the suit in its entirety or recuse yourself. I will give you until the end of today to decide, at which time I intend to file pleadings with the Court.” In a reply email to the Kohls’ attorney on June 21st, McClure attempted to revive a prior settlement discussion; which the Kohls’ attorney immediately rejected, stating that he would file a motion to disqualify McClure unless he withdrew. After a further exchange of emails on June 21st concerning these issues, the Kohls’ attorney emailed McClure, “The Town is a necessary party – it owns the street in question and your claim challenges that ownership. No more emails please. Withdraw voluntarily or we will let the Court decide.” McClure did not resolve the conflict of interest by either withdrawing as plaintiffs’ counsel or resigning from the Planning Board.

23. On or about June 24, 2011, the Kohls filed a motion to disqualify McClure as counsel for the plaintiffs because of the conflict of interest created by his position as an elected official of the Town. On or about July 5, 2011, McClure filed plaintiffs’ opposition to the Kohls’ motion. The Town neither joined nor opposed the Kohls’ motion.

24. Despite the motion to disqualify him, McClure continued to actively represent his clients in the Fair Street Lawsuit. By email, dated September 27, 2011, to Town Counsel, McClure tried to convince the

Town to abandon its rights to the paper street at the center of the dispute in the Fair Street Lawsuit. McClure wrote, in relevant part, “it sounds as though the town would have no objections to abandoning any further right to the paper street (70 feet); especially given the fact that it would deny access to the Kohl’s [sic] landlocked parcel and prevent the 40B project he proposed earlier (or anything subsequent). Any sewer/water easements are protected regardless.” McClure sent Town Counsel follow-up emails seeking a decision from the Town on his proposal on September 28th and 29th, writing “Kindly bring this to the attention of your client and advise by week’s end.” Town Counsel responded by email on September 29th stating that he had forwarded McClure’s “settlement offer” to the Town Manager and asked that it be put on the executive session for the board of selectmen’s meeting the following Monday, October 3rd. When McClure, in a September 29th email, requested Town Counsel’s confirmation that the settlement offer would be considered, Town Counsel replied later the same day by email, “It is the Town’s position that you are not qualified to represent the plaintiffs in this matter because you are on a town board. I have forwarded the information you have sent to me because at this point you are still in the case and I am ethically obligated to present any offers to my client.” On October 3, 2011, Town Counsel informed McClure that the Town would not negotiate with him a possible settlement of the Fair Street Lawsuit as long as he continued to serve on the Planning Board.

25. On October 6, 2011, after a hearing at which McClure, as plaintiffs’ attorney, argued against the motion, the court allowed the Kohls’ motion to disqualify McClure from the Fair Street Lawsuit. On October 12, the Court allowed McClure’s assented-to motion to withdraw as plaintiffs’ counsel.

26. McClure was compensated for his private legal work in the Fair Street Lawsuit prior to his election to the Planning Board, but was not thereafter compensated for that work.^[7]

Decision

The Petitioner must prove its case and each element of the alleged violations by a preponderance of the evidence. 930 CMR 1.01(10)(o). The weight to be

attached to any evidence in the record, including evidence concerning the credibility of witnesses, rests within the sound discretion of the Commission. 930 CMR 1.01(10)(n)3.

In order to have established in these adjudicatory proceedings that McClure, while serving as a Planning Board member, repeatedly violated §17(c) in connection with the Fair Street and Recall lawsuits as alleged, Petitioner must have proved, as to each alleged violation, each of the following elements by a preponderance of the evidence: that (1) McClure was a municipal employee; (2) who acted as agent or attorney for anyone other than the Town or a Town agency; (3) in prosecuting any claim against the Town, or in connection with any particular matter in which the Town was a party or had a direct and substantial interest; (4) otherwise than in the proper discharge of his official duties as a Planning Board member and municipal employee.

We first discuss the evidence concerning the Recall Lawsuit and then concerning the Fair Street Lawsuit.

The Alleged Violations based on the Recall Lawsuit

McClure was a Municipal Employee

The parties stipulated that McClure was elected to the Planning Board on April 5, 2011 and sworn into office on April 13, 2011, and that, as a Planning Board member, he is a municipal employee as defined in G. L. c. 268A, §1. Municipal planning board members are indisputably municipal employees within the meaning of the conflict of interest law. G. L. c. 268A, §1(g). McClure has admitted that Town Planning Board members are municipal employees. The continuity of McClure's service on the Planning Board during the entire period relevant to the allegations is established by the evidence in the record that McClure was still on the Planning Board as of October 2011, when he was disqualified as plaintiffs' counsel in the Fair Street Lawsuit because of his membership on the Planning Board. Thus, this element of § 17(c) has been proved by a preponderance of the evidence.

McClure acted as Agent or Attorney for anyone other than the Town

As set forth above in paragraphs 3 through 14 of the Findings of Fact, the evidence establishes that, between April 21 and May 5, 2011, McClure repeatedly acted as attorney for the private plaintiffs in connection with the Recall Lawsuit against the Town Clerk. Thus, for example, McClure, on behalf of named and unnamed registered voters of Chelmsford: on April 21st, wrote and sent a demand letter to the Town Clerk threatening litigation; on April 22nd, filed in superior court a complaint and an emergency motion for injunctive relief; on April 26th, 27th and 29th, wrote and sent letters to superior court clerks concerning motions and hearings; on April 26th, filed plaintiffs' emergency motion for further injunctive relief and an amended complaint; also on April 26th sent an email to the Town Manager stating the terms for his withdrawing plaintiffs' motion; and on April 22nd and May 2nd or 3rd, appeared in court and argued motions.^[8] Each of McClure's actions in the Recall Lawsuit until April 26th were expressly done as attorney for the plaintiffs, as were the April 27th and 29th letters. While in the First Amended Complaint and in other filings on or after April 26th, McClure was named as a plaintiff and purported to act as a "plaintiff pro se", he was in fact still actively acting as plaintiffs' attorney through at least the May 2nd or 3rd hearing on plaintiffs' motion for further injunctive relief. Indeed, because McClure did not withdraw his appearance as plaintiffs' counsel, and no other attorney actually took any action on behalf the other plaintiffs until the May 5th hearing (which the new attorney attended with McClure), McClure's representation of the other plaintiffs continued until the court's May 6, 2011 order disqualifying him. Thus, this element of § 17(c) has been proved by the preponderance of the evidence.

In connection with a particular matter in which the Town was a party or had a direct and substantial interest

McClure admitted in his Amended Answer that the Recall Lawsuit was a particular matter. The Recall Lawsuit, as a proceeding, claim and controversy, was indisputably a "particular matter" as defined by G. L. c. 268A, § 1(k). McClure, however, denied in his Amended Answer that the Town was a party to or

had a direct and substantial interest in the Recall Lawsuit.

Given that the Recall Lawsuit was a suit against the Town Clerk in her official capacity as such the Recall Lawsuit was effectively a suit against a department of the Town, i.e., the office of the Town Clerk, and a particular matter in which the Town was a party. In addition, where the Recall Lawsuit concerned the plaintiffs' effort to require a recall election for four Town selectmen, and the interpretation of Town Charter and state laws governing such elections, and where the Town Clerk was represented by Town Counsel, the Town clearly had a direct and substantial interest in lawsuit and its outcome. Thus, this element of § 17(c) has been proved by the preponderance of the evidence.

Otherwise than in the proper discharge of his official duties as a Planning Board member and municipal employee

The evidence indicates that McClure's involvement in the Recall Lawsuit was as a private attorney acting on behalf of his private clients and as a plaintiff. There is no evidence that any of McClure's acts as an attorney in the Recall Lawsuit were in the proper discharge of his official duties as a Planning Board member. Thus, this element of § 17(c) has been proved by the preponderance of the evidence.

Therefore, Petitioner has proved by a preponderance of the evidence that McClure violated of § 17(c) in connection with the Recall Lawsuit.

The Alleged Violations based on the Fair Street Lawsuit

McClure was a Municipal Employee

This element of §17(c) has been proved by the preponderance of the evidence, as set forth above.

McClure acted as Agent or Attorney for Anyone other than the Town

As set forth above in paragraphs 17 through 24 of the Findings of Fact, the evidence establishes that, between April and October, 2011, McClure repeatedly acted as attorney for the private plaintiffs in connection with the Fair Street Lawsuit against the

Kohls and the Town. Thus, for example, McClure, as attorney for the plaintiffs: on June 21st, attempted to negotiate a settlement with the Kohls; in June 2011, communicated with Town Counsel and the Kohl's attorney concerning dropping the Town from the lawsuit; in late September 2011, tried through emails to Town Counsel to convince the Town to abandon its rights to the "paper street" at the center of the dispute in the lawsuit; and during the period of early July into early October, 2011, opposed the Kohls' motion to disqualify him as plaintiffs' counsel. Thus, this element of § 17(c) has been proved by the preponderance of the evidence.

In connection with a particular matter in which the Town was a party or had a direct and substantial interest

McClure admitted in his Amended Answer that the Fair Street Lawsuit was a particular matter. The Fair Street Lawsuit, as a proceeding, claim and controversy, was indisputably a "particular matter" as defined by G. L. c. 268A, § 1(k). McClure denied, however, that the Town was a party to or had a direct and substantial interest in the Fair Street Lawsuit.

The evidence shows that the Town was a defendant in the Fair Street Lawsuit, thus a party to that particular matter. In addition, in the suit, McClure's clients inter alia alleged that the Town had abandoned whatever interests it had had in the paper street land (except for a sewer easement) and that they were the rightful owners of the land; particular matters in which the Town had a direct and substantial interest. Thus, this element of § 17(c) has been proved by the preponderance of the evidence.

Otherwise than in the proper discharge of his official duties as a Planning Board member and municipal employee

The evidence establishes that McClure's involvement in the Fair Street Lawsuit was solely as a private attorney acting on behalf of his private clients. There is no evidence that any of McClure's acts as an attorney in the Fair Street Lawsuit were in the proper discharge of his official duties as a Planning Board member. Thus, this element of § 17(c) has been proved by the preponderance of the evidence.

Accordingly, we find that Petitioner has proved that McClure violated § 17(c) in connection with the Fair Street Lawsuit.

Conclusions and Findings

For the above-stated reasons, we conclude and find: that Petitioner has proved by a preponderance of the evidence that McClure repeatedly violated G. L. c. 268A, § 17 in 2011 by, while serving as a Chelmsford Planning Board member, repeatedly acting as attorney for his private clients in the Fair Street and Recall lawsuits in each of which particular matters the Town was a party and had a direct and substantial interest.

Resolution

In his concluding Brief, McClure argues for dismissal of these proceedings because, “while there may be sufficient facts to warrant finding reasonable cause to believe that a violation of the conflict of interest law has occurred, the violation does not involve either willful misconduct, significant economic advantage, the misuse of influence or confidential information, significant loss to the public or the potential for serious impact on the confidence in its officials.” McClure argues that “the Commission is clearly authorized to utilize its discretion given the unusual circumstances of this particular case to make a finding similar to that in [*In the Matter of Jack Speranza*, Docket No. 07-0018, 2009 SEC 2246],” in which the Commission, in an exercise of discretion, vacated its prior finding of reasonable cause and authorization of the adjudicatory proceeding and terminated the adjudicatory proceeding.^[9] McClure argues that he acted in good faith, was guided in his actions by his duties to his clients, his profession and the Massachusetts Rules of Professional Conduct, and that his “actions in both the Recall Action and the Land Court Action did not constitute a knowing violation of Section 17(c) given the underlying circumstances.”

In its concluding Brief, Petitioner argues that there are numerous exacerbating factors in this case, including McClure’s long experience as an attorney, the multiple warnings, both spoken and written, that McClure received that he was violating § 17(c), and the fact that McClure could have avoided violating

the law by withdrawing as plaintiffs’ counsel or resigning from the Planning Board, but chose to do neither until forced by court order. Petitioner asserts that a penalty should be imposed reflecting the willful nature of McClure’s violations.

We conclude that McClure’s violations were not mitigated by any circumstances warranting us to exercise our discretion to dismiss these proceedings. We reject and find disingenuous McClure’s argument that his actions in violation of § 17(c) were the result of his faithful dedication to his duties to his clients, his profession and the Massachusetts Rules of Professional Conduct for the following reasons. First, even if McClure were so motivated, his is a casebook demonstration of why § 17(c) exists: thus, by his actions in commencing and continuing to serve as a private attorney in the Recall and Fair Street lawsuits, McClure placed himself in situations where the interests of and his duties to his private clients and his employing municipality were in conflict, and, in each case, he chose his duties to his clients and their interests over his duties to the Town and its interests, at best mistakenly believing that he had a higher duty to the former than to the latter. Second, if he felt it his duty as an attorney to continue to represent the plaintiffs in the two lawsuits, McClure could easily have avoided the resultant conflicts of interest by resigning from the Planning Board. He chose not to do so, but instead counseled his clients in the Fair Street litigation to drop their claims against the Town so that he could continue to represent them. While willfulness and knowledge are not required elements of a § 17(c) violation, for purposes of determining the resolution of this matter, we find that McClure’s actions, particularly after his warning by Town Counsel on April 22, 2011, were knowing and willful. Under these circumstances, McClure’s violations warrant the civil penalty imposed below.

Order

Accordingly, to the degree that McClure has made a motion to dismiss these proceedings, that motion is **DENIED**. Therefore, having found that McClure violated G. L. c. 268A, § 17, in connection with the Fair Street and Recall lawsuits as specified above, the Commission, pursuant to the authority granted it by

G. L. c. 268B, § 4(j), hereby **ORDERS** McClure to pay a civil penalty of \$5,000 for those violations.

DATE AUTHORIZED: August 2, 2013

DATE ISSUED: August 26, 2013

[1] Commissioner Regina L. Quinlan did not participate in this matter.

[2] Section 17(c) provides that no municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

[3] McClure subsequently completed the Commission's online conflict of interest law training program on June 20, 2011. Among other issues, the training covered the restrictions on a public employee acting as agent or attorney for anyone other than his employing government in matters involving the government.

[4] Where McClure had filed the complaint as plaintiffs' attorney, had not withdrawn his appearance as plaintiffs' counsel and no other attorney had appeared in the case as plaintiffs' counsel, we find that, despite how he attempted to characterize his signatures on documents filed with the court, McClure was acting as plaintiffs' attorney. In addition, we find that McClure was acting as agent for the plaintiffs.

[5] McClure testified that as of May 2nd he was "limited to representing myself pro se in the pleadings." Regardless of whether this was in fact the case "in the pleadings", McClure, as described infra, continued to represent the plaintiffs at the hearing on May 2nd or 3rd on the motion for further injunctive relief.

[6] Notwithstanding McClure's testimony, where the motion in question was "plaintiffs' motion" and no other attorney appeared for the plaintiffs to argue for the motion, we find that McClure acted as plaintiffs'

attorney and not as a pro se plaintiff in appearing at the hearing and arguing for the motion. In addition, the parties stipulated that the motion for further injunctive relief was "brought by" McClure. According to the May 6, 2011 order denying it, the motion alleged that the Town, two selectmen and the Town Manager had been interfering with plaintiffs' right to petition for signatures in connection with their recall effort.

[7] McClure sought and received both written and telephone opinions from the Commission's Legal Division during the relevant period. By letter dated August 9, 2011, McClure sought advice about a matter then about to come before the Planning Board involving an applicant for an occupancy permit requiring "as built" approval from the Planning Board against whom he had previously personally bought suit (the dismissal of which McClure was then appealing). The Town was also a defendant in the suit, which alleged, inter alia, improper permitting process and site plan review by various Town boards, including the Planning Board. McClure inter alia inquired as to: whether he could speak before the Planning Board as a plaintiff and/or resident; whether he could question the applicant as a Board member; and whether he could deliberate and vote as a Board member on the application. McClure did not ask for advice concerning the lawsuits at the center of this matter. McClure's August 9th request for advice is relevant to these proceedings only to the extent that the informal written opinion, issued to McClure on August 30, 2011, contained a detailed explanation of §17, making it clear that McClure, as a municipal employee, could not act as attorney for anyone other than himself in any matter involving the Town, and directed McClure to *Commission Advisory 88-01 – Agency Part A: Municipal Employees Acting as Agent*. On September 29, 2011, McClure by telephone asked: (1) whether as attorney who is an elected Planning Board member (which is not a special municipal employee position) he may represent a client in a matter involving a "paper street" if the Town is dropped from the lawsuit; and (2) whether his opponent's motion to remove him from the case because of a conflict is required by the conflict of interest law? In response, McClure was advised by the Legal Division that no advice could be provided to him concerning his past conduct and that

prospectively he must comply with §17, which was explained to him. As to his first question, McClure was told that he may represent a private party in the matter only if the Town is not a party to the matter and does not have a direct and substantial interest therein (even if it is not a party). As to his second question, McClure was told that because it involved past conduct, no opinion could be provided on whether his past conduct required him to withdraw from the case even if the Town is no longer a party and does not have a direct and substantial interest in the matter. McClure was not advised that he could act as plaintiffs' attorney to arrange the dismissal of the Town from the lawsuit.

^[8] We do not include or rely on McClure's actions at the May 5th hearing because of the presence of the new attorney for the other plaintiffs' at that hearing.

^[9] In so ruling, the Commission stated, "we note that this exercise of our discretion is limited to the peculiar facts of this matter." [*In Re Speranza*], 2009 SEC at 2247.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 12-0002**

**IN THE MATTER OF
CHERYL JACQUES**

DECISION AND ORDER

Appearances: Stephen P. Fauteux, Esq.
Nancy O. Rothstein, Esq.
Counsel for Petitioner

Leonard H. Kesten, Esq.
Counsel for Respondent

Commissioners: Charles B. Swartwood, III, Ch.
Paula Finley Mangum
Martin F. Murphy
William J. Trach
Regina L. Quinlan

Presiding Officer: Commissioner William J. Trach

I. INTRODUCTION AND ALLEGATIONS

Cheryl Jacques is an administrative law judge for the Department of Industrial Accidents. Petitioner, the Enforcement Division of the State Ethics Commission, contends that the evidence in this case proves that Jacques contacted a dental office in connection with a dispute over the bill for dental work performed for her brother-in-law, Preston Green, stated she was a judge and demanded that the dental office write off a debt of more than \$1,000 that Green owed for treatment already rendered. Petitioner alleges that Jacques violated G.L. c. 268A, § 23(b)(2)(ii) because she attempted to use her official position to secure for her brother-in-law unwarranted privileges or exemptions of substantial value – worth \$50 or more -- which were not properly available to similarly situated individuals.

This case centers on three phone calls on November 12, 2010 between Jacques and personnel at Tremont Dental: the front desk receptionist, Andrew Halchak, the office manager, Jin Choi, and the owner, Dr. Og Lim. In her defense, Jacques argues that she did not attempt to use her official position in connection with the dispute over the bill, contending that she only mentioned that she was a judge when, late in the last phone call, she was asked about it directly by Dr. Lim. She also argues that she did not attempt to secure an unwarranted privilege for Green, contending that Halchak had told her brother and Green that Tremont Dental was a preferred provider organization ("PPO") for Green's insurance company, and that she only asked Tremont Dental to charge Green at PPO rates, per the insurance company's policy.

II. THE EVIDENCE

With regard to almost every fact pertinent to a resolution of this case, testimony by Cheryl Jacques, her brother, Thomas, and Preston Green directly contradicted testimony by Halchak, Choi, and Dr. Lim.

Representations about insurance coverage

Thomas W. Jacques (“Thomas”) is Cheryl Jacques’s brother. Thomas’s spouse is Preston Green. In the summer of 2010, Thomas made an appointment for Green at Tremont Dental. Green is a state employee. Green testified that his insurance was Delta Dental PPO.^[1]

Jin Choi was the office manager at Tremont Dental. At the hearing, she explained that Tremont Dental was in network with the Delta Dental Premier plan. If a patient was out of network, Tremont Dental could take the patient, but it was the patient’s decision to see Tremont Dental. Choi explained that out-of-network patients have to pay more out of their pocket than they would if they went to an in-network provider or the insurance company will not pay for some procedures at all.

“PPO” means preferred provider organization. Choi explained that she trained the front desk receptionists to tell potential customers with Delta Dental PPO plan coverage that Tremont Dental was not in network with their insurance. Tremont Dental would ask the patient to give information about his insurance, and then Tremont Dental would call or go online to the insurance company to find out about costs.

Dr. Lim testified that insurance is a relationship between employees or policyholders and insurance companies. She said that her office does not have a responsibility to tell a patient that he can get cheaper service at another office. She acknowledged that she had said at her deposition that it was up to the patient to find out whether he or she could pay less by going somewhere else. At her deposition, she also had said, “If I can get a discount price at this discount store, that department store, that’s up to me to. The department store is not going to tell me if you go to the other department store, you get better price.” Dr. Lim stated that there is no way for Tremont Dental to know what price patients would get at another office.

Choi handled complaints from customers. Dr. Lim testified that if there were complaints about insurance coverage or insurance claims, Choi handled them, and if there were any further problems, then they would come to Dr. Lim.

Thomas Jacques testified about making the appointment at Tremont Dental for Green. Previously, Thomas had gone to a dentist in Wellesley, and first he was told that the office was a PPO provider for him, and later he was told it was not, so he left the appointment. When he made an appointment for Green, he knew that he had to go to a dentist that was an in-network PPO for Green’s insurance in order to get the PPO rates.

Thomas testified that he spoke to Andrew Halchak, the front desk receptionist at Tremont Dental, and asked whether Tremont Dental was a preferred provider for Delta Dental. According to Thomas, Halchak said yes, and Thomas made the appointment. Thomas did not verify with Delta Dental that Tremont Dental was a preferred provider.

Halchak did not testify at the hearing. The evidence, however, includes three reports of interviews with Halchak on March 15, 2011, June 15, 2011, and February 9, 2012. Exhibits also include his sworn interview taken May 15, 2011, his deposition taken September 7, 2012, and an affidavit he signed on November 1, 2012.

Halchak testified that he did not think he had ever spoken to Tom Jacques, and that he is not sure who called to arrange Green’s appointment.

At Green’s first appointment, Green asked Halchak to confirm that Tremont Dental accepted his insurance, Delta Dental PPO. Green gave the following testimony:

Q: And what did you ask him?

A: I told him who I was. I had an appointment but I want to confirm again you do accept my insurance.

Q: Did you ask him to accept your insurance or are you a PPO?

A: Well, both. Do you accept my insurance? It’s Delta Dental PPO.

Halchak testified that Tremont Dental was in-network with the Premier Plan from Delta Dental and if someone has Delta Dental, and it is not Premier,

then he would tell them it is up to them to find out if they will be able to get covered at Tremont Dental.

Green's first appointment was on August 21, 2010. Halchak began working for Tremont Dental the first or second week of August, 2010.

At his sworn interview on May 25, 2011, Halchak testified that he thought he had a conversation with Green once when he first started there. He acknowledged that Green had the PPO Plan, which was out of network. When Halchak first started at Tremont Dental, he would not have told Green if he was in-network or out-of-network because he would not have known at the time. "I hadn't actually learned that much about it, so if someone asked if we accepted Delta Dental, all I could have said was either yes or no."

At his deposition on September 7, 2012, Halchak testified that he knew very little about insurance in August, 2010. He testified that in August, before he was fully trained, he would have told patients that they accept any insurance that is willing to pay except MassHealth. He also testified that he had no memory of speaking to Green.

Through all of his testimony, Halchak was not asked whether he told Green that Tremont Dental was a PPO, and he did not state at any time whether he told Green that Tremont Dental was a PPO.

Discussions between Choi and Green

Jin Choi, the office manager, testified that she met with Green twice to talk about the cost of his treatment. She remembered that he had a root canal and post and core and crowns. When Green called for an appointment, they got his insurance information and Tremont Dental was out of network for his insurance. Choi testified that she personally discussed with Green that Tremont Dental was out of network. She told him, "[t]hat means insurance not going to pay and that means you're going to pay more. So if you are going to see other office who is in network with your insurance, then you will get covered more."

Choi testified that she asked Halchak to call Green before his first visit, and that she also called Green.

She testified that she talked to Green the first time he came in. She said she wrote a note in Green's chart because she wanted other people to explain again that he's not in network. Before he signed his consent form and chart, she explained this to him and showed him his plan copy from the insurance company.

For any type of procedure costing more than \$300, Tremont Dental asks the insurance company for a pre-estimate, and the insurance company sends the pre-estimate to Tremont Dental and to the patient. Green received a pre-estimate dated September 28, 2010. It listed \$1,400 for a porcelain crown and \$822.25 as the amount the patient has to pay. The estimated insurance payment was \$312.31. The procedure was done on October 8, 2010.

Choi explained that in Green's case, they sent a pre-estimate even for treatments that cost less than \$300 because they wanted to keep the record as proof that they informed the patient that he would not be covered by his insurance. Choi testified that when she showed Green the pre-estimate, he said it was too much for him. They gave him a payment plan. He made payments in accordance with the plan. He was supposed to pay 50% on the first visit and \$200 or \$300 every month.

Green, however, testified that he never spoke to the office manager at Delta Dental. He said the name, Jin Choi, did not mean anything to him. In addition, Green testified that Tremont Dental did not put him on a payment plan. Green received bills for appointments on August 21, September 18, October 8 and November 5, 2010. He made three payments, believing they were the PPO rates.

Jacques contends that Choi did not speak to Green at his first appointment because August 21 was a Saturday and Choi was not at Tremont Dental on Saturdays. Also, Choi described Green as white, blonde, and five foot six. Green, however, has dark brown hair and is five foot ten.

In her brief, Jacques notes that Choi failed to mention the conversations she had with Green at her deposition, and mentioned them for the first time at the hearing. Jacques contends that Choi made up the conversations to justify Tremont Dental's failure to

honor the PPO rates after Halchak told Thomas Jacques and Green that Tremont Dental was a PPO.

Cheryl Jacques' initial involvement in the dispute about the dental bill

Cheryl Jacques previously served as an Assistant Attorney General and a State Senator. There is no dispute that, in her current position as an administrative law judge for the Department of Industrial Accidents, she is a state employee.

Both Thomas and Cheryl Jacques testified that Jacques handled financial matters for both Thomas and Preston Green. Thomas testified that he and Green had dinner with Jacques and complained about the amount of Green's dental bills. Like Green, Jacques had the state plan and thought the bills should not be so high. Thomas brought the bills to Jacques. Green left her his card, which said he had Delta Dental PPO insurance.

Jacques called Delta Dental and learned that Tremont Dental was not a preferred provider organization. She testified that the representative at Delta Dental said that if Tremont Dental was saying they are a PPO and they are not, and they are billing Green the higher rates, she should talk to the dentist and the dentist should correct it and honor the PPO rates. Jacques Googled the Delta Dental PPO rates and gave them to Thomas and Green.

Thomas testified that he called Tremont Dental and spoke first with Halchak. He said he was Preston Green. Halchak, however, testified that he never spoke with Green and does not recall speaking with anyone calling on Green's behalf or about Green's insurance other than Cheryl Jacques.

Thomas testified that he spoke the next day with Dr. Lim. Thomas testified that he explained to Dr. Lim that they were told Tremont Dental was a preferred provider, and he should have gotten PPO rates. Dr. Lim said it was not the office's responsibility, but rather the patient's responsibility.

Thomas testified that he was angry and tried to "play hard ball" with Dr. Lim. He told Dr. Lim that his sister was involved with consumer protection fraud when she was a state senator, and was an assistant

attorney general and a judge, and his other sister was a former assistant D.A. At the hearing, Thomas acknowledged that he stated at his deposition and in an affidavit dated January 26, 2012 that, before Cheryl Jacques spoke with Dr. Lim, Dr. Lim knew Jacques was a judge because he had told her.

Dr. Lim, however, testified that no one had called to discuss Preston Green's bill before Cheryl Jacques did, and that she did not get a call from Thomas. Dr. Lim testified that, prior to her conversation with Cheryl Jacques, no one had ever told her that Green's sister-in-law was a judge.

Thomas testified that he subsequently told Jacques that he had gotten nowhere, but did not tell her he had mentioned her positions to Dr. Lim. He did not mention this to Jacques until after an ethics investigation regarding her began.

Cheryl Jacques' calls with Tremont Dental

The evidence shows that Jacques called Tremont Dental on November 12, 2010 and spoke first with Halchak, then with Jin Choi, and finally with Dr. Lim about Preston Green's outstanding bill for dental services.

Call with Halchak

Jacques testified that she called Tremont Dental from work on her cell phone. She introduced herself to Halchak as Cheryl Jacques, and told him she was calling on behalf of her brother, Preston Green. She told him she was a lawyer, but was calling as a sister about Green's bill. According to Jacques, Halchak admitted that he "really messed that up," and Jacques acknowledged that it was a misunderstanding. She told Halchak the solution was to charge Green "what he should have been charged had you guys in fact been the PPO you said you were." Halchak said he had no authority to do that.

Jacques testified that she never mentioned her job to Halchak.

Halchak gave a series of statements about the call from Jacques. They were not consistent about whether Jacques told him she was a judge.

The interview report dated March 15, 2011, states that he “indicated that she mentioned her profession when she identified herself.” She told him “she was a judge, that she was representing Green and that she was Green’s sister.”

In the sworn interview on May 25, 2011, Halchak stated, “she said she was his sister and she was a judge in Massachusetts...” He stated, “she said she would call back again, that she was a judge and she was going to call back again if we didn’t call back...” He thought “she was trying to get me to do things immediately, rather than ask someone else.” He said, “it’s not like she said, you know, ‘This will happen if this doesn’t get done.’ She was just identifying herself I think to let me know that she meant business.”

In the interview dated February 9, 2012, however, Halchak stated that he may have first learned that Jacques was a judge when he spoke with her over the phone, or it may be that someone at Tremont Dental told him after the fact. He said he thinks Jacques told him she was a judge when she called. The interview states, “He also stated that someone in the Tremont Dental Office (he’s not sure who) told him in passing that she was a judge in Massachusetts.” He stated that he did not learn that Jacques was a judge before she called him. “He said no one knew she existed before her call; no one had heard of her prior to him speaking with her.”

At his deposition on September 12, 2012, he was asked whether Jacques told him she was a judge during their conversation, and he testified, “I don’t recall when I found that out.”

In the affidavit that he signed on November 1, 2012, Halchak stated that he was still working for Tremont Dental on May 25, 2011 when he gave his sworn interview. He wrote, “When I gave the May 25, 2011 statement, the events of fall 2010 were fresh in my mind and I had a clear recollection of the situation regarding Preston Green’s bill, and the phone conversation I had with Cheryl Jacques about Mr. Green’s bill.”

Halchak testified that Jacques said Tremont Dental had billed Green incorrectly, and that it could not charge him this amount, and that she “told us we

needed to write it off.” She wanted him to “just write it off without any questions asked obviously,” and “just wanted the charge to be completely forgiven.” She wanted Tremont Dental to “get rid of” Green’s debt “completely,” “just write off any – whatever his balance was on his account – to get rid of it.” She wanted to erase his outstanding debt as of the time that she was calling. “She just wanted it erased from his – from his account so he wouldn’t have to pay anything else.”

He said “she didn’t say a ‘because’.” She told Halchak she had called Delta Dental, and they had told her Tremont Dental had made a mistake in billing and couldn’t charge Green that much. He and Choi called Delta Dental right afterwards, and they did not have a record of Jacques calling them.

Halchak said Jacques did not say anything about Tremont Dental’s provider status, and that he did not recall any discussion about “the PPO concept.”

Halchak is not on record anywhere as having told Cheryl Jacques that he mistakenly told Green that Tremont Dental was a PPO.

Call with Choi

Halchak transferred Jacques’s call to Jin Choi. Jacques testified that she said again she was a lawyer, but was calling as Green’s sister. Jacques testified that she told Choi that there was a misunderstanding and that Halchak misinformed her brother about Tremont Dental’s provider status. According to Jacques, Choi said she did the books and did not know about insurance, and Jacques would have to talk to Dr. Lim.

Jacques testified that she never mentioned her job to Choi.

Choi testified that Jacques said she was Green’s sister, asked her to look at Green’s bills, and said she thought they were hurting patients. Choi said Jacques started the conversation calmly, then started yelling. Choi was “about to explain, but [Jacques] didn’t give me a chance to explain or talk.” Choi testified that she received complaints similar to the one from Jacques. Usually, they let her talk and they

could come to an agreement or they understand what is going on, but Jacques did not let her talk.

Choi testified that Jacques “mentioned attorney general or a judge.” Choi heard each of these positions once. Jacques said “she does this kind of claims every day so she knows how this thing works.” When Choi heard attorney general or judge, she was “[k]ind of feeling threatened even though we are not doing anything wrong about the procedure but I felt the power from her because she could do something to us. So she's going to, you know, let our business down.” Jacques told Choi she had called the manager at Delta Dental, and that “Delta Dental is really mad about this matter” and if what Tremont Dental did was true, Delta Dental said they would drop Tremont Dental as a provider.

Choi testified that Jacques wanted her to totally write off the patient’s payment. She testified that she put Jacques on hold, spoke with Dr. Lim, and then offered Jacques a 50% discount. Jacques said that if Green went to his in-network provider, he would not pay anything. Choi explained that even if he went to his in-network provider, it would not have been 100% covered by insurance.

Jacques asked to speak with Dr. Lim, who was not available. Dr. Lim subsequently called Jacques back.

Call with Dr. Lim

Dr. Lim testified that she usually does not work on Friday, but she was in the office to do flower arranging. She explained, “Jin came and she was very, very upset saying a judge called and she's very angry about billing and she wants to talk to you.” She confirmed that she testified at her deposition, “They were worried that they may get in trouble by the judge and they would get in trouble because there was a judge who called. I heard this judge probably about ten times myself.” At the hearing, she clarified that she heard this ten times from Choi and maybe Halchak, too, not from Jacques.

Dr. Lim called Jacques back, and Jacques introduced herself as a judge. Lim said, “I’m Dr. Lim and she said, I’m Judge Cheryl Jacques and she said she is the sister of one of the patients in the office.” Lim testified, “She was very threatening, intimidating and

even just hearing, you know, a judge, I was already pretty much intimidated and she says she's very upset so I said, what can I do? What do you want me to do?” Lim testified that Jacques said she was a judge only once when she was introducing herself, “but I think that’s enough. Would you forget that? I don't forget that.”

Dr. Lim testified that Jacques said her brother had been treated in her office and if he had gone to another dentist’s office, the bill would have been much lower, and her office did not tell him that it would be a lot more expensive, and they tricked him. Dr. Lim testified that Jacques demanded that she “write off the entire balance.”

Dr. Lim thought that was wrong, but maybe her office had not told Green how much the treatment would be. She said she needed to speak with the treating doctor. She said there may have been an honest mistake, but no tricking. Jacques had told her that Green was handicapped and in a financially difficult situation, and Dr. Lim felt bad. She offered a 50% discount, somewhere in the range of \$500, and regretted it afterward. Dr. Lim said that she was “scared” and “just didn’t want to have a problem with the judge so I offer a very big discount.” Dr. Lim testified that Jacques did not accept the discount, and then she threatened to revoke her provider status with Delta Dental and file criminal charges for fraud with the Attorney General.

Jacques testified that she introduced herself to Dr. Lim as a lawyer and as Green’s sister. She testified that in twelve years in the Senate, she was uncomfortable with being called Senator Jacques. She stated that she typically introduces herself as Cheryl, and that her staff and interns call her Cheryl. She also explained in her defense, “If I wanted to influence somebody, I wouldn’t use the title administrative judge. Ninety percent of the world doesn’t even know what that is... I would have used Senator Jacques because that would have opened a lot more avenues than Judge Jacques.... It sounds like a cartoon character, and I don’t even use that.”

Jacques testified that she told Dr. Lim that Halchak had made “an innocent enough mistake,” but that her brother could not afford to pay for it. According to Jacques, Dr. Lim immediately said it was not their

responsibility, and even if Halchak made a mistake, it was the patient's responsibility. Jacques argued that telling a patient he needs to check with his insurance company is different from affirmatively answering a patient's inquiry confirming they were a PPO when they were not. Dr. Lim's response was that he got his pre-bill and chose to pay it, but Jacques said Green thought it was PPO rates. Jacques told Lim that affirmatively misrepresenting that they were a PPO was fraud. She said she would advise her brother to explore all avenues: the Consumer Protection Division of the Attorney General's Office, the Better Business Bureau, a case under c. 93A, investigation by the Division of Licensure and small claims. Jacques testified that she was upset, but her tone was "lawyerlike." At some point, Dr. Lim offered a discount of \$100 or \$200, and Jacques refused to accept it because the office should be honoring the PPO rates.

Both Dr. Lim and Jacques testified that toward the end of the conversation, Jacques made reference to her position. Dr. Lim said that Jacques was being very aggressive and said, "Now I'm going to report you. Give me your full name and your address." Dr. Lim refused and said it was public information. Jacques asked whether Dr. Lim was "afraid of something." Lim said Jacques was "really bullying me." Dr. Lim wanted to get out of the conversation and said she had patients waiting, and then Jacques said, "well, I'm busy, too. I'm in-between trials or cases." Dr. Lim testified that the conversation ended when Jacques said she was going to report Dr. Lim to the Attorney General's Office and Dr. Lim said, go ahead.

Jacques contends that she had to say she was a judge because of what Lim said to her. Jacques testified that "at some point [Lim] said something like, I don't have time for this insurance. I'm a doctor. I have patients waiting and I said, exasperatedly, I said, you know, Doctor, with all due respect I don't want to be doing this either. I've got a courtroom full of people waiting for me." Lim then asked, "are you a judge?" Jacques said, "I am." After saying it, she thought "[t]hat shouldn't have come out."

Jacques testified that she subsequently told an Ethics Commission investigator that she "inadvertently"

identified herself as a judge. "I said, I had a courtroom full of people, and then she asked me if I was a judge and then I was trapped. I had to say yes. I wasn't going to lie..."

Jacques acknowledged that she did not have to respond to Dr. Lim by saying she was a judge, but testified it was never her intent to introduce her position into the conversation. After saying it, she thought "[t]hat shouldn't have come out." She called the reference to her position as "my slip" and testified, "That was probably inappropriate. I probably should have discontinued the call immediately."

Jacques testified that the conversation about the bill resumed briefly before she and Dr. Lim hung up. She said that she should have gotten off the phone after identifying herself as a judge, and did so "[w]ithin about a minute or two." Jacques testified, however, that before the call ended, she repeated arguments from earlier in the conversation. At the hearing, she said that Dr. Lim said it's the patient's responsibility again and Jacques again distinguished between advising a patient to check his insurance and affirmatively misrepresenting. She also acknowledged previous deposition testimony in which she asked for a reduction of \$800 and rejected an offer of \$100 as inadequate.

Aftermath of Cheryl Jacques' calls

Having spoken with Jacques, Dr. Lim spoke with Halchak and Green's treating doctor. Dr. Lim testified that she asked Halchak about what he had said to Green. Halchak told her that when Green came in and asked do you accept Delta Dental, he said yes. Halchak told her this is what he "probably said."

Green's treating doctor confirmed to Dr. Lim that Green had received a pre-estimate from the insurance company and had agreed to it. Dr. Lim looked at the estimate authorization from the insurance company. Afterwards, Dr. Lim concluded that they had done nothing wrong and she regretted offering the 50% discount.

Dr. Lim also called Green and asked him for authorization to speak with Jacques about his dental records.

Cheryl called Thomas and told him that she got nowhere with Dr. Lim. She and Thomas both testified that she advised him about his legal options.

On November 13, 2010, Thomas and Green wrote a letter from Green and faxed it to Tremont Dental. The letter authorized Tremont Dental to speak with "Attorney Cheryl Jacques," and asked for a reply to be sent to Cheryl Jacques's e-mail address. It stated that on two occasions, Halchak had told Green that Tremont Dental was a PPO, and included a list of PPO rates which, Thomas testified, he got from Delta Dental. The cost at PPO rates would have been \$1,310.00. Green already had paid \$1,149.00. The difference was \$161.00. The letter made an offer to pay \$161.00 to close the bill. Finally, the letter threatened to sue for a refund pursuant to G.L. c. 176D and G.L. c. 93A, to bring a formal complaint with Delta Dental, the Attorney General's Consumer Protection Division and the Division of Professional Licensure.

At the hearing and in notes she had made before her deposition, Dr. Lim stated that this letter demanded a "write-off," but she acknowledged that the letter actually asked for charges to be made at PPO rates. She confirmed, however, that on the phone, Jacques had demanded a write-off of the entire balance, which was different than what Green was asking for in the letter.

Dr. Lim testified that she was pretty angry when she got this letter, and she "started looking into this judge" and "went online and got all sorts of information about if a judge could be practicing law." She wrote back to Green on November 17.

With respect to your attorney (Cheryl Jacques), we received a telephone call from her in which she treated the staff in a highly abusive and intimidating manner. Ms. Jacques asserted that she is a seated judge for the Commonwealth and would be providing you with legal representation. She also stated that she would personally see to it that our provider status would be revoked and we would face charges if we do not write off your debt. Our lawyer has advised

us that calling on behalf of friends or family members to resolve personal matters using her authority as a judge is violating the code of judicial conduct.

In the letter, Dr. Lim also wrote that the full amount of \$1,147.19 was due. She also wrote:

Your statement that we intentionally claimed to have a PPO status in order to entice you into treatment is also false. The statement we made to you was that we take Delta Dental insurance. We are a participating Delta Dental provider. After contacting Delta Dental regarding your case they reiterated that the terms of your contract specify that selection of a provider is at your discretion and is solely your responsibility.

Subsequently, Thomas hired a lawyer, Kelly Neumann. Dr. Lim sent her a letter demanding payment. Attorney Neumann resolved the matter. She did not get Green the PPO rates, but did get a discount. At the time, Green owed about \$1,100. Dr. Lim recalls a discount of \$100. Thomas recalls that the discount was about \$200. Green recalls that they paid about \$600, or about half of the bill.

III. BURDEN OF PROOF

To prove the alleged § 23(b)(2) violation, Petitioner must demonstrate by a preponderance of the evidence that (a) Jacques was a state employee and that (b) knowingly, or with reason to know, (c) she attempted to use her official position as a judge (d) to secure for her brother-in-law an unwarranted privilege or exemption (e) which was of substantial value, i.e., worth \$50 or more, and (f) which was not properly available to similarly situated individuals.^[2] G.L. c. 268A, § 23(b)(2)(ii), 930 CMR 1.10(10)(o).

The weight to be attached to any evidence in the record, including evidence concerning the credibility of witnesses, rests within the sound discretion of the Commission. 930 CMR 1.01(10)(n)3.

IV. ANALYSIS OF THE EVIDENCE

As just noted, Petitioner was required to prove by a preponderance of the evidence that Jacques attempted to use her position, and that she did so knowingly, or with reason to know. Petitioner's theory was that Jacques used her position as a judge by injecting it

into her conversations with Tremont Dental personnel, intending it to give weight to an implied threat of adverse consequences if they failed to accede to her demand.

Given the spate of contradictions in the evidence, the resolution of this case necessarily will depend on determinations about credibility. If the Commission finds that two witnesses providing contradictory testimony as to a required element of the violation are both credible, Petitioner does not meet the preponderance of 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]’. *Tartas’ Case*, 328 Mass. 585 (1952).” *In Re Kinsella*, 1996 SEC 833, at 835.

The witnesses gave contradictory testimony about whether Jacques introduced herself as a judge during her phone calls with Tremont Dental personnel. Andrew Halchak gave varying testimony about whether he heard from Cheryl Jacques or from office staff that she was a judge. The Commission is not persuaded that his testimony that he heard it from Jacques necessarily was more accurate because he gave the testimony closer in time to the phone call with Jacques. Jin Choi said she heard “attorney general or judge” only once. The Commission finds no basis for concluding that this testimony by Halchak and Choi was more credible than Jacques’ testimony that she did not mention her job to either Halchak or Choi.

Dr. Lim adamantly insisted that Jacques called herself “Judge Cheryl Jacques” at the beginning of the phone call. Dr. Lim also testified that Jacques threatened to take steps if Tremont Dental failed to resolve a dispute about Green’s bill and demanded a complete write-off of the bill. Just as adamantly, Jacques testified that she did not identify herself as a judge, that she mentioned steps Green could take if Tremont Dental failed to resolve a dispute about his bill, and that she demanded that Green be charged at PPO rates. Some support for Jacques’s version is that the letter that Green sent to Tremont Dental on November 13, 2010, which undoubtedly demonstrates Jacques’s input, makes the same request that Green be charged at PPO rates and lists

the same consequences for failing to resolve the dispute that Jacques says she mentioned during her phone call with Dr. Lim.

At the end of their telephone call, both Dr. Lim and Jacques testified that Jacques referred to her position, but there were contradictions even in these accounts. Dr. Lim testified that Jacques made the statement as a reply to her statement that she had patients waiting. Jacques testified that when Dr. Lim mentioned she had patients waiting, Jacques said she had a courtroom full of people waiting, and Dr. Lim asked her if she was a judge, and Jacques was “trapped” into saying she was a judge.

The Commission is thus confronted with two competing versions of what occurred. The version in which Jacques identified herself as a judge at the start of the conversation regarding the disputed bill would prove the element of § 23(b)(2) with regard to attempted use of her position, and would support a finding of a violation if Petitioner also proved that she threatened adverse action against Tremont Dental in a manner prohibited by § 23(b)(2) in order to gain an advantage for Green in his private dispute with Tremont Dental. Under the other version of what occurred, however, Jacques’s mention of her position was inadvertent and only in response to Dr. Lim’s question.

Again, the Commission has no basis for determining whether Dr. Lim’s testimony that Jacques mentioned her title purposefully or Jacques’s testimony that she mentioned it inadvertently is more credible. While best avoided, we would not consider an inadvertent mention of one’s position, in response to someone else’s question asking whether one holds that position, to amount to a knowing attempted use of position in violation of §23(b)(2).

After an assessment of credibility, the facts established by the evidence in this case are equally consistent with no violation as with a violation. Accordingly, Petitioner has not proved by a preponderance of the evidence that Jacques knowingly, or with reason to know, attempted to use her position to gain an unwarranted privilege for Green. *In Re Kinsella*, 1996 SEC at 835.

V. ORDER

The allegation that Cheryl Jacques violated § 23(b)(2)(ii) by using her position to secure an unwarranted privilege for her brother-in-law, Preston Green, with regard to a bill for dental services from Tremont Dental is **DISMISSED**.

DATE AUTHORIZED: August 2, 2013

DATE ISSUED: September 3, 2013

^[1] Dr. Lim testified that Delta Dental had three plans, PPO, PPO Plus Premier, and Premier, and she insisted that Green had PPO Plus Premier, not PPO. However, the parties do not dispute that Green's coverage was Delta Dental PPO.

^[2] On numerous occasions, the Commission has found that public employees have violated § 23(b)(2) by using or attempting to use their official positions to promote a personal or family interest or gain an advantage in a private dispute or transaction for themselves or someone else. See, e.g., In Re Lincoln Smith, 2008 SEC 2152 (employee who worked for the City Council demanded that a garage immediately resolve a claim about damage to his car rather than follow usual procedures, stating that he was "on the City Council," the garage's permits went through his office and he would remember the name of the owner of the garage); In Re Travis, 2001 SEC 1014 (state representative who was chairman of the Joint Committee on Banks and Banking solicited a donation to a private charity from a bank that had an interest in legislative matters before the banking committee and left phone messages saying "If we can't deal with this issue, I'm sure we'll have problems with others" and "I certainly will remember this particular incident."); In Re Haluch, 2004 SEC 1165 (in discussions about the amount he would receive from a company to restore land impacted by the construction of a pipeline, Chairman of the Public Works Commission stated that he wielded a lot of power and influence in the town, that he would make sure the pipeline's bonds were not released, and that he could shut down the pipeline); In Re DeWald, 2006 SEC 2051 (Finance Committee Chair, who had authority to review and approve money to pay legal bills for special counsel to a land dispute, called special counsel at the request of opposing counsel, introduced himself as the Financial Committee Chair,

and tried to persuade her to settle the case); In Re Galewski, 1991 SEC 504 (while conducting inspections, an assistant building inspector asked the developer first to sell him a lot, and then to sell him a house at a price more affordable than the usual price); In Re Foley, 2001 SEC 1008 (Council on Aging outreach worker who was authorized to handle an elderly woman's affairs arranged to have her son and daughter-in-law pay only \$7,000 plus outstanding bills for the woman's house, which later was sold to someone else for \$90,000).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 13-0011**

**IN THE MATTER OF
DELWIN DICKINSON**

DISPOSITION AGREEMENT

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

On February 15, 2013, 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. On May 17, 2013, the Commission concluded its inquiry and found reasonable cause to believe that Dickinson violated G.L. c. 268A, § 6.

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

Findings of Fact

1. Delwin Dickinson, a resident of Woburn, was during the relevant time the Hosting Services Director for the Commonwealth of Massachusetts Information Technology Division ("ITD")^[1]. As

such, Dickinson was a “state employee,” as that term is defined in G.L. c. 268A, § 1.

2. As Hosting Services Director, Dickinson’s duties included, but were not limited to: (1) drafting requests for quotes (“RFQs”) for the procurement of goods and services; (2) posting RFQs and acting as the contact person to receive vendor responses; (3) selecting members of the procurement management teams to evaluate and score vendor responses to RFQs; (4) calculating procurement management team scores to select the winning vendor; (5) awarding contracts based on those scores; and (6) approving vendor payments.

RFQs 13-02 and 13-03

3. In 2012, ITD had a contract with IBM, under which IBM provided maintenance services for Hewlett Packard (“HP”) and Intel brand products. That contract was due to expire in June 2012.

4. For business reasons, Dickinson, in early spring 2012, decided to put the HP and Intel product maintenance work performed by IBM out to bid through two separate requests for quotes.

5. On April 27, 2012, Dickinson applied online for a posted project manager position at Advizex, a reseller of computer hardware and software, and provider of related services, and a longtime ITD vendor.

6. On May 9, 2012, Dickinson interviewed for the Advizex project manager position.

7. Also on May 9, 2012, Dickinson sought information from Advizex about ITD obtaining HP software support.

8. Dickinson began negotiations with Advizex regarding prospective employment on May 9, 2012, which culminated in his hire in September 2012.

9. On or about May 11, 2012, Dickinson completed drafting RFQ 13-02 for HP hardware and software maintenance services and RFQ 13-03 for Intel hardware maintenance, and forwarded those RFQs to the ITD Legal Department for its review. According to Dickinson, he drafted the RFQs in a manner that would ensure the work would be performed at the best possible value.

10. Between May 11, 2012 and May 25, 2012, Dickinson worked on revisions to RFQs 13-02 and 13-03 with the ITD Legal Department.

11. On May 25, 2012, Dickinson posted RFQs 13-02 and 13-03 on the ITD website.

12. Dickinson knew Advizex would submit a quote for RFQ 13-02 because he had been in contact with Advizex about ITD obtaining HP software support. Additionally, Dickinson knew Advizex would submit quotes for RFQ 13-02 and 13-03 because computer hardware and software maintenance was part of its business and Advizex had an extensive history of doing business with ITD.

13. Between May 25, 2012 and June 26, 2012, Dickinson: selected procurement management teams (“PMT”) of Hosting Services staff to evaluate and score vendor responses to RFQ 13-02 and 13-03; acted as the contact person for vendor responses; answered vendor inquiries regarding the RFQs; and collected the PMT scores to calculate the winning vendors. As to RFQ 13-03, Dickinson also responded to questions from PMT members regarding scoring.

14. On June 19, 2012, Advizex submitted quotes to Dickinson in response to RFQs 13-02 and 13-03.

15. On June 25, 2012, Dickinson requested Advizex’s best and final offers on RFQs 13-02 and 13-03, respectively, which Advizex provided on June 26, 2012.

16. On or about June 26, 2012, based on the PMT scores and Advizex’s best and final offer, Dickinson awarded the contract for the services set forth in RFQ 13-02 to Advizex for \$414,500 and awarded the contract for the services set forth in RFQ 13-03 to Advizex for \$141,324.

17. Advizex hired Dickinson in September 2012.

Conclusions of Law

18. Except as otherwise permitted, § 6 of G.L. c. 268A prohibits a state employee from participating^[2] as such an employee in a particular matter^[3] in which, to his knowledge, an organization with which he is

negotiating^[4] or has any arrangement concerning prospective employment, has a financial interest.^[5]

19. The HP software and maintenance contract for the services set forth in RFQ 13-02 (the “13-02 Contract”) was a particular matter.

20. The Intel hardware maintenance contract for the services set forth in RFQ 13-03 (the “13-03” Contract) was also a particular matter.

21. Dickinson began negotiating for prospective employment with Advizex on May 9, 2012, and those negotiations continued until his hire in September 2012.

22. After May 9, 2012, Dickinson participated in the 13-02 and 13-03 Contracts in his capacity as Hosting Services Director by: (1) drafting RFQ 13-02 and 13-03; (2) selecting the PMT members; (3) acting as the contact person for vendor RFQ responses; (4) responding to vendor inquiries regarding the RFQs; (5) collecting the PMT scores to calculate the winning vendors; (6) soliciting Advizex’s best and final offer; and (7) awarding the contracts. Dickinson also responded to questions from PMT members regarding RFQ 13-03 scoring.

23. According to Dickinson, he knew that Advizex had a financial interest in the 13-02 and 13-03 Contracts because he knew Advizex would be bidding on the contracts. In addition, Dickinson knew after Advizex had submitted quotes that Advizex had a financial interest in the 13-02 and 13-03 Contracts.

24. Accordingly, Dickinson repeatedly violated § 6 by participating in his capacity as the ITD Hosting Services Director in the 13-02 and 13-03 Contracts while negotiating for employment with Advizex, a company he knew would bid on the contracts.

Payment Approvals

Findings of Fact

25. On May 15, 2012, Dickinson, in his capacity as the ITD Hosting Services Director, approved payment to Advizex for \$5,162 under a pre-existing contract between ITD and Advizex for computer equipment and accessories.

26. On May 22, 2012, Dickinson, in his capacity as the ITD Hosting Services Director, approved payment to Advizex for \$2,175.77 under a pre-existing contract between ITD and Advizex, for computer equipment and accessories.

27. On June 29, 2012, Dickinson, in his capacity as the ITD Hosting Services Director, approved payment to Advizex for \$32,594.25 under a pre-existing contract between ITD and Advizex for computer equipment and accessories.

28. On July 12, 2012, Dickinson, in his capacity as the ITD Hosting Services Director, approved payment to Advizex for \$414,500 pursuant to the 13-02 Contract.

Conclusions of Law

29. Dickinson’s decisions to approve payments to Advizex were particular matters.

30. Advizex had a financial interest in receiving payment for goods and services pursuant to its contracts with ITD.

31. By approving payments to Advizex, Dickinson participated in his capacity as Hosting Services Director in those decisions.

32. Dickinson began negotiating for prospective employment with Advizex on May 9, 2012, and those negotiations continued until his hire in September 2012.

33. At the time of his participation, Dickinson knew that Advizex had a financial interest in receiving payment for goods and services.

34. Therefore, Dickinson repeatedly violated § 6 by approving \$454,432.02 in payments to Advizex in his capacity as ITD Hosting Services Director while negotiating for employment with Advizex.

Resolution

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

(1) that Dickinson pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$30,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 6; and

(2) that Dickinson 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 4, 2013

^[1] ITD is an agency within the Executive Office of Administration and Finance that provides computer hardware and software services to Commonwealth of Massachusetts agencies.

^[2] “Participate” means to “participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” *G.L. c. 268A, § 1(j)*.

^[3] “Particular matter” means “any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding . . .” *G.L. c. 268A, § 1(k)*.

^[4] “Negotiating for employment” occurs when there is a mutuality of interest. *EC-COI-90-01*. For example, such interest occurs when a public employee interviews for a position.

^[5] “Financial interest” means any economic interest of a particular individual that is not shared with a substantial segment of the public. *Graham v. McGrail*, 370 Mass. 133 (1976).

ADVICE



EDUCATION



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