



March 21, 2011

MEMORANDUM TO MUNICIPAL CLIENTS

RECEIVED

MAR 23 2011

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: Notable New Regulations from the State Ethics Commission

BOARD OF SELECTMEN

On July 1, 2009, several amendments to General Laws Chapter 268A, the Conflict of Interest Law, took effect, including increased civil and criminal penalties, mandatory online training for municipal employees, and establishing local "liaisons" to the State Ethics Commission ("Commission"). Section 3(f) directed the Commission to issue regulations to define the meaning of "substantial value," clarify several issues regarding limitations on public employees giving or accepting gifts, and to establish "additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest." The Commission recently issued its initial regulations on these subjects and they are in effect. These regulations, 930 CMR §1.00-7.00 ("the Regulations"), may be viewed at the Commission's website at <http://www.mass.gov/ethics>. While the Regulations cover an extensive range of subjects, there are several sections of particular interest to city and town officials and employees that arise with some regularity, and these will be summarized below. You should remember that the term "municipal employee" as used in Chapter 268A includes virtually anyone performing services for the municipality, whether by election or appointment; paid or unpaid; contract or volunteer; or on a full or part-time basis.

Gifts to Public Employees

While a bribe made to or accepted by a public employee with "corrupt intent" is of course illegal pursuant to G.L. c.268A, §2, a more complicated restriction is set forth in §3. This section prohibits a public employee from accepting a gift of "substantial value" that is offered "for or because of official acts performed or to be performed." The Regulations define "substantial value" as \$50.00 or greater. Section 3 applies to gifts without regard to the intent of the donor, so any gift worth more than \$50 that is merely offered for goodwill or to say "thank you" is still prohibited by §3. If a gift made to a public employee is truly unrelated to the employee's duties or actions, it is not covered by Chapter 268A or the Regulations.

1. **Gifts to Teachers and Others**

One obvious conflict this creates is the long-standing practice of students and/or their parents wishing to make small gifts to a public school teacher. The Regulations now state that a teacher may accept a gift of up to \$150 aggregated value during the school year, provided that the gift is made as

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a class gift (individual donors not identified). The teacher is not required to make any written disclosure of such a gift. If an individual parent or small group of parents wish to make a personal gift to a teacher, however, it cannot exceed \$50 and the teacher is required to file a written disclosure of the gift with his or her appointing authority in accordance with G.L. c.268A, §23(b)(3). Similarly, any public employee may accept a gift worth up to \$50 but must file a written disclosure if the gift may create an appearance of bias, favoritism or undue influence. The \$150 aggregate exception applies only to teachers, however.

2. “Substantial Value”

The term “substantial value” has long been interpreted by the State Ethics Commission as anything worth \$50 or more, and it is now defined in the Regulations as such. The Regulations further provide that the Commission may aggregate the value of gifts offered within a 365 day period and may also consider the “fair market value” of a gift. If, for example, an individual makes three \$20 gifts to a public employee over a period of weeks or months, the Commission may view this as a prohibited single gift worth \$60. Moreover, if a \$40 event ticket has a fair market value substantially higher than the face value due to the scarcity of such tickets, the Commission may find the ticket to be a prohibited gift. More examples may be found at 930 CMR 5.05.

3. Exemptions Allowing Gifts Exceeding \$50 in Value

There are several circumstances, now addressed in the Regulations, where the Commission will find that a particular gift worth over \$50 is not prohibited by §3. These exemptions, which are described in detail at 930 CMR 5.08, include:

- Travel expenses, where the purpose of the travel is related to a legitimate public purpose (but excluding the expenses of the employee’s family members).
- In-state travel for educational purposes (training).
- Legitimate speaking engagements related to the employee’s position.
- Public employee discounts, if offered to all public employees.
- Ceremonial or retirement gifts.

Exemptions Unrelated to Gifts

1. Encouraging Volunteer Service

The Regulations also address several topics of common concern to municipal employees that do not concern gifts but have historically made it difficult for certain individuals to volunteer or have interactions with their municipal government. For example, G.L. c.268A, §20 restricts a municipal employee’s ability to have a private financial interest in a contract made by the city or town, unless he or she can qualify for an exemption from §20. This can prohibit an individual with such an

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interest from serving on an unpaid board, if no exemption is available. Section 6.02(1)(a) of the Regulations now provides, however, that someone with a pre-existing financial interest in a contract with the municipality may serve in an uncompensated position or volunteer board without needing to meet a §20 exemption.

Chapter 268A, §17 can also restrict volunteer public service options. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in a matter in which the city or town has a direct interest. If an individual's business is involved with a project of interest with a town, for example, he may be prohibited from having a volunteer position to the town because an inadvertent §17 violation can result. Section 6.02(1)(b) of the Regulations provides, however, that a person with compensated non-public employment may serve in an uncompensated office and still receive their compensation, even if it would otherwise violate §17(a).

2. Involvement with Non-Profit Organizations

Section 17(c) prohibits a municipal employee from acting as an "agent or attorney" for anyone other than the municipality in a matter in which the municipality has an interest. One example of how this can cause a conflict is where a public official wishes to serve on a board of a non-profit organization which interacts with municipal government ("Friends of the Public Library," for example), even where the non-profit's articles of organization provide for a municipal representative. The public official would also be prohibited by G.L. c.268A, §19 from participating in matters involving the organization's financial interests. This conflict now has a partial exemption. Section 17(c) will still prevent the municipal employee from acting as agent or spokesperson for the private organization in dealing with the municipality. Section 6.08(2) of the Regulations now provides, however, that if a non-elected city or town official is appointed to the board of a non-profit organization to serve as the municipal agency's representative on that board, he may now act in his public capacity on matters in which the non-profit has a financial interest without violating §19.

3. Conveying Real Property to Municipality

Private property owners may wish, for a variety of reasons, to convey to a municipality either a parcel of real property or a conservation or other use restriction on the parcel, to preserve it as open space, for example. Since G.L. c.268A, §20 prohibits municipal employees from having a financial interest in a contract with their city or town, however, it is difficult for a public official or employee to make such a conveyance, and the statutory exemptions in §20 often do not apply. Section 6.10 of the regulations now provides that such a transaction does not violate §20, provided that the municipal employee "does not participate in or have official responsibility for the agency's process of recommending or selecting properties on which to acquire such [property interests], or for decision-making with respect to such recommendation and selection" and files a written disclosure of the contract with the city or town clerk.

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A similar issue arises when a municipality seeks to acquire real property owned by a municipal employee through eminent domain. A taking does not constitute a “contract,” but if the employee seeks to resolve the proposed taking by negotiating a purchase price, this is a contractual interest under §20. The new regulations, at Section 6.15, now exempt such a transaction from §20, although all other provisions of Chapter 268A will still apply.

4. Fee-Based Contractual Relationships

Another example of a prohibited §20 contractual relationship, while not an obvious one, is where a municipal employee pays the municipality a fee to enroll in a program or other service – a summer recreation program or a membership in a municipal golf course, for example. The new regulations now exempt such “contracts” from §20, provided that the programs have a set fee (as opposed to a bargained-for cost) and are readily available to the general public at the same fee.

5. Senior Tax Abatement Programs

Many municipalities have adopted programs to allow resident senior citizens to perform temporary work for the city or town in exchange for a reduction in the resident’s property taxes. Since this creates a contractual relationship between the resident and the city or town, the resident is considered a “municipal employee,” and §20 is triggered if the resident holds a municipal office or job or has an interest in another municipal contract. Section 6.17 of the new regulations now provides that a participant in a senior tax abatement program may hold additional municipal positions or have other contractual interests, provided that the employee does not participate in or have official responsibility for administering the tax abatement program.

6. Town Clerks Participating in Elections When on the Ballot

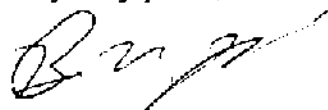
Another long-standing conflict issue that had not been adequately addressed until now concerns when an incumbent elected Town Clerk, serving in a compensated office, performed his or her normal statutory duties in organizing and supervising an annual election when the Clerk’s office is on the ballot. Since the Clerk has a “financial interest” in retaining the office, the State Ethics Commission found that §19 generally prohibited a Clerk from participating in such elections – however, this policy ignored the reality that a City or Town Clerk has sole statutory duties for numerous aspects of the election, with no statutory means of delegating that authority. The same issue arises for appointed City or Town Clerks, in the Ethics Commission’s opinion, when members of their appointing authority appear on the ballot. The State Ethics Commission has now addressed this problem in Section 6.20 of the new regulations. In summary, the Clerk is now authorized to handle all normal election functions when he or she (or the appointing authority) appears on the ballot that “are not likely to be outcome-determinative.” Examples of outcome-determinative functions, which someone else must perform, are (1) checking an adversary’s nomination papers, or the papers of members of the appointing authority and their adversaries, or (2) certifying the names on such nomination papers, or the Clerk’s own papers, and (3) recounts involving the Clerk’s office.

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Clerks should review the provisions of Section 6.20 to determine when they must recuse themselves from specific election activities.

This is not an exhaustive review of the State Ethics Commission's new regulations, but it is intended to highlight some scenarios that often arise for municipal employees. In some cases, these regulations provide welcome new exemptions for situations where §§19 and 20 of Chapter 268A apply too restrictively and can discourage residents from serving as much-needed volunteers in local government. Specific questions regarding 930 CMR 1.00 et seq. may be addressed to the State Ethics Commission's Legal Division.

Very truly yours,



Brian W. Riley