



CITY OF CAMBRIDGE
INTEROFFICE CORRESPONDENCE

To Russell B. Higley, City Solicitor

Date January 30, 1985

From Paul E. Healy, City Clerk

Reference

Subject City Council communication #9 of 1/28/85

Enclosed you will find a copy of a communication from Robert V. Greco, Executive Director, State Ethics Commission, as received by the City Council at its meeting of Monday, January 28th, 1985. Said communication, relative to "Commission Advisory No. 7 - Multiple Office Holding on the Local Level", was referred to the City Solicitor at the aforementioned meeting, with the request for a report within one month.

Your very kind attention in this matter will be greatly appreciated, both by this office and the City Council.

PEH/mh

Enclosure: City Council communication #9 of 1/28/85

Comm. from Robert V. Greco, Exec. Director,
State Ethics Commission, Re: Commission
Advisory No. 7 - Multiple Office Holding on
the Local Level.

*Copy to the
City Solicitor
File*

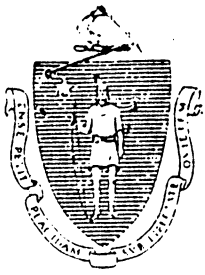
Report in one month

In City Council,

January 28, 1985

1/28/85

*- Placed
on
File*



THE COMMONWEALTH OF MASSACHUSETTS

STATE ETHICS COMMISSION

ONE ASHBURTON PLACE ROOM 1413

BOSTON, MASSACHUSETTS 02108

727-0060

COMMUNICATIONS CLASS

COMMISSION MEMBERS

COLIN S. DIVER (CHAIRMAN)
DAVID BRICKMAN
FRANCES M. BURNS
JOSEPH I. MULLIGAN, JR.

ROBERT V. GRECO
EXECUTIVE DIRECTOR

TO: City Councillors, Selectmen, City Solicitors and Town Counsel
FROM: Robert V. Greco, Executive Director
DATE: January 25, 1985
SUBJ: Commission Advisory No. 7 - Multiple Office-Holding
on the Local Level

The Commission has prepared the attached Advisory in an attempt to reduce the confusion that has resulted from recent statutory changes, enforcement actions and advisory opinions regarding multiple office-holding on the local level. The Advisory and the accompanying chart are geared to address the most common forms of multiple office-holding and will, for the most part, contain sufficient information to identify what will or will not be a problem under the conflict of interest law. To the extent that further information or clarification is necessary, please feel free to call our office.

The Commonwealth of Massachusetts State Ethics Commission

John W. McCormack State Office Building, Room 1413
One Ashburton Place, Boston 02108
Telephone (617) 727-0060

COMMISSION ADVISORY NO. 7

MULTIPLE OFFICE HOLDING AT THE LOCAL LEVEL

Over the last few years, the propriety of holding more than one position at the local level has been the subject of numerous Commission rulings and enforcement actions. In turn, those rulings and actions have triggered legislative debate, statutory amendments and local controversy in many cities and towns, resulting in some instances in town meeting action and even special elections.

The precise legal issue involved concerns that part of the conflict of interest law (specifically §20 of G.L. c. 268A) which prohibits a municipal employee from having a financial interest in a contract with his own city or town. That prohibition has been deemed to encompass other employment contracts or relationships; in other words, if you have another job with your municipality, you will be deemed to have another contract. Whether a person who holds more than one position in a municipality will run afoul of the conflict law may depend on several considerations: whether the positions are elected or appointed, whether the person is a special municipal employee and therefore qualifies for one of the exemptions applicable to special employees, whether one of the positions held is that of selectman or clerk for whom there are specific provisions, and whether the person qualifies for the exemptions for certain kinds of part-time work.

In an effort to clarify a very complicated subject, we have devised the following chart. The fourteen situations listed generally cover the most common forms of multiple office-holding at the local level. There can be dangers, however, in any attempt to simplify. In using this chart, we caution you as follows:

- * Make sure you distinguish a simple "yes" from a "yes, if." Where the latter applies, read the rest of the columns to the right to see what conditions must be satisfied.
- * A more detailed analysis of the conflict law as it applies to these situations follows the chart. You may also need to refer to portions of that analysis.
- * If any questions still remain, take them up with your town counsel or city solicitor.
- * If there are any changes in the law in this area, we will highlight them in the BULLETIN.

MAY YOU SIMULTANEOUSLY HOLD THE FOLLOWING PAID POSITIONS ?	YES OR NO	MAY YOU RECEIVE BOTH PAYS	MUST YOU BE A SPECIAL EMPLOYEE	MUST BOARD OF SELECTMEN OR CITY COUNCIL APPROVE	MUST YOU MAKE A DISCLOSURE TO CLERK	MUST YOU SATISFY OTHER CONDITIONS	MUST TOWN MEETING APPROV.
NON-ELECTED EMPLOYEES							
1. 2 FULL-TIME APPOINTIVE POSITIONS	NO						
2. A FULL-TIME APPOINTIVE POSITION and a PART-TIME APPOINTIVE POSITION IN DIFFERENT AGENCIES	YES, <u>IF</u>	YES, <u>IF</u>	NO	YES	YES	YES (SEE PARA. No. 11, BELOW)	NO
3. A FULL-TIME APPOINTIVE POSITION and a PART-TIME APPOINTIVE POSITION IN SAME AGENCY	NO						
4. 2 PART-TIME APPOINTIVE POSITIONS IN SAME AGENCY	YES, <u>IF</u>	YES, <u>IF</u>	YES, IN BOTH POSITIONS	YES	YES	NO	
5. 2 PART-TIME APPOINTIVE POSITIONS IN DIFFERENT AGENCIES	YES, <u>IF</u>	YES, <u>IF</u>	YES, IN BOTH POSITIONS	NO	YES	IF NOT A SPECIAL IN BOTH, BE GUIDED BY QUESTION 2 ABOVE.	ONLY IF AGENCY IS A TOWN BOARD OR COMMISSION OF WHICH YOU ARE A MEMBER (SEE PARA. 13, BELOW)
CITY AND TOWN CLERKS							
6. CLERK and ANY OTHER POSITION	YES	YES	NO	YES	NO	YES; IN A CITY, MAYOR MUST APPROVE	YES
SELECTMEN							
7. SELECTMEN and ANOTHER ELECTED POSITION	YES	YES	NO	NO	NO	NO	NO
8. SELECTMEN IN A TOWN WITH POPULATION UNDER 5,000 and AN APPOINTIVE POSITION (REGARDLESS OF WHEN ACQUIRED)	YES, <u>IF</u>	YES, <u>IF</u>	YES, AS A SELECTMAN; IF NOT A SPECIAL, BE GUIDED BY QUESTIONS 9 and 10 BELOW	YES (WITHOUT YOUR PARTICIPATION)	YES	NO	YES, IF BOARD OF SELECTMEN APPOINT YOU TO OTHER POSITION
9. SELECTMAN and AN APPOINTIVE POSITION HELD PRIOR TO BECOMING SELECTMAN	YES	NO, BUT YOU MAY CHOOSE WHICH PAY	NO	NO	NO	NO	NO
10. SELECTMAN and AN APPOINTIVE POSITION ACQUIRED AFTER BECOMING SELECTMAN	NO						
OTHER ELECTED OFFICIALS							
11. 2 ELECTED POSITIONS	YES	YES	NO	NO	NO	NO	NO
12. AN ELECTED POSITION and a FULL-TIME APPOINTIVE POSITION IN DIFFERENT AGENCIES	YES, <u>IF</u>	YES, <u>IF</u>	YES, IN ELECTED POSITION	NO	YES	NO	NO
13. AN ELECTED POSITION and a PART-TIME APPOINTIVE POSITION IN DIFFERENT AGENCIES	YES, <u>IF</u>	YES, <u>IF</u>	YES, IN ELECTED POSITION	NO	YES	ONLY IF YOU ARE NOT A SPECIAL IN ELECTED POSITION	NO
14. AN ELECTED POSITION and ANY APPOINTIVE POSITION IN THE SAME AGENCY	YES, <u>IF</u>	YES, <u>IF</u>	YES, IN ELECTED POSITION	YES	YES	NO	ONLY IF AGENCY IS A TOWN BOARD OR COMMISSION OF WHICH YOU ARE A MEMBER (SEE PARA. NO. 13, BELOW)

1. As noted above, §20 of G.L. c. 268A prohibits an employee of a city or town - whether elected or appointed - from having a financial interest in a contract with that same municipality. This provision is intended to prevent municipal employees from using their positions to obtain contractual benefits from their own municipality and to avoid the public perception that they have an "inside track" on such opportunities. The relationship between a city or town and its employees is considered contractual in nature. Thus, §20 will come into play whenever a municipal employee has another employment relationship with his city or town.
2. The Commission first addressed this issue in September of 1980. In an advisory opinion (EC-COI-80-89), it was found that a selectman who was a teacher violated §20. A court subsequently ruled the same way in the case of Walsh v. Love, Norfolk Superior Court, Civil Action No. 132687. These rulings led to various attempts to amend the statute. Those proposed amendments ranged greatly in effect; some would have allowed most kinds of office-holding, others addressed specific situations. To date, there have been three statutory changes.
3. First, a specific provision was passed for selectmen. According to c. 107 of the Acts of 1982, someone may work for a town and also be selectman provided
 - a. as a selectman he does not vote on matters within the purview of the agency he works for,
 - b. he was a town employee before he became a selectman,* and
 - c. he receives only one pay.
4. Second, a specific provision was passed for clerks. According to c. 5 of the Acts of 1984 (amending G.L. c. 41),

Notwithstanding the provisions of c. 268A, any clerk of a city or town who also serves in any other position for such city or town may in addition to any compensation to which he may be entitled as such city or town clerk receive such additional compensation for such additional services as the selectman, town meeting, town counsel or mayor and city council may provide.

This provision has been interpreted to apply to clerks only, and not their assistants. See EC-COI-84-142.

* A selectman is not eligible to be appointed to another town position while serving as selectman or for six months thereafter.

5. Finally, Governor Dukakis recently signed into law c. 459 of the Acts of 1984 which allows someone holding more than one elected position in a town to be compensated in both positions.
6. As to people not covered by the provisions discussed in paragraphs 3, 4 and 5, whether they violate the statute by having more than one position depends on
 - a. whether the positions involved are elected or appointed,
 - b. whether the person is a special municipal employee,
 - c. if so, whether the person would qualify for one of the exemptions available to special employees,
 - d. if not a special, whether the person would qualify for one of the limited exemptions available to regular employees.

In the paragraphs that follow, these four considerations will be discussed.

7. The distinction between elected and non-elected positions is important because the courts have held that election to public office does not give rise to a contractual relationship. See cases cited in EC-COI-82-26. Thus, there would be no financial interest in a municipal contract for purposes of §20.
8. The conflict law distinguishes between regular municipal employees and special municipal employees. Typically, the latter are individuals who serve on a part-time or unpaid basis. The distinction is important since §20 will apply in a less restrictive fashion to special employees. Specifically, there will be exemptions available to "specials" that are not available to other employees. These exemptions make it easier for special municipal employees to have other jobs or positions with their own city or town. In the following two paragraphs are discussed (1) the process by which employees are designated as specials and (2) the exemptions available to specials.
9. It is the city council, board of aldermen, or board of selectmen, as the case may be, which alone has the authority to designate a municipal employee as a "special." The following rules or standards apply to that designation process:
 - * A Mayor, an alderman, or a city councilor can never be a "special municipal employee."

- * A selectman in a town with a population in excess of 5,000 people can never be a "special."
- * A person is eligible for special employee status only if
 - a. he is not paid, or
 - b. he is specifically permitted to have private employment during normal working hours, or
 - c. he did not earn compensation for more than 800 hours during the preceding 365 days.

Typically, the "special" category would include members of part-time boards and commissions or individuals serving on a consultant basis.

- * All employees who hold equivalent offices, positions, employment or membership in the same municipal agency must have the same classification. For example, designating only one member of a school committee as a "special" would be inappropriate. Either all the members of the committee are "specials" or none of them may be.
10. There are two exemptions in §20 applicable to special municipal employees. While these exemptions are general in nature and apply to all types of contracts, their impact on multiple office-holding situations is as follows. First, a special municipal employee may have another paying position in his city or town if
- * in his capacity as a special municipal employee, he does not participate in or have official responsibility for any of the activities of the agency with which he wants to have the second job (in other words, as noted in the above chart, it is a different agency), and
 - * he files a statement with his city or town clerk disclosing that he has the other job.

Second, a special municipal employee may have a second job with his own agency if

- * the city council, board of aldermen, or board of selectmen, as the case may be, approve, and
- * he files a statement with the clerk disclosing that he has the other job.

Thus, the special can have a second job with another agency just by filing the required disclosure. If he wants to have a second job with his own agency, he must file the disclosure and get the approval of the applicable board.

11. There are two exemptions in §20 that come into play for people who are not special employees. The first of these (§20(b)) would allow a municipal employee to have a second job with his city or town if all of the following conditions are satisfied:
- a. the second job is with a completely separate agency,*
 - b. there has been public advertising for the position;
 - c. he files a statement with the city or town clerk disclosing that he has the other job,
 - d. the hours he works on the two jobs do not overlap,
 - e. the services he performs in the second job are not part of his duties in his regular job,
 - f. he is not compensated in his second job for more than 500 hours a year,
 - g. the head of the second agency certifies that no employee of that agency is available to do this work as part of his regular duties, and
 - h. the city council, board of aldermen, or board of selectman, as the case may be, gives its approval.

These conditions are set by the statute in order to ensure that everybody has an opportunity to seek such jobs and that the additional work is necessary and does not impinge on the employee's regular work.

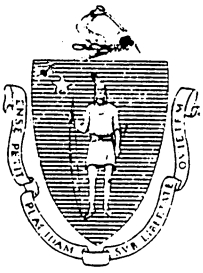
12. Second, there is an exemption that allows a municipal employee to work part-time or on call for the police, fire, rescue or ambulance department of the city or town if
- a. the city or town has a population under 35,000,
 - b. the head of that department certifies that no employee of his department is available to do this work as part of his regular duties, and

* In his regular position, he must not even participate in or have official responsibility for any of the activities of the second agency. Moreover, the agency for which he regularly works must not regulate the activities of the second agency.

- c. the city council, board of aldermen, or board of selectman approve.
13. Finally, a separate provision of G. L. c. 268A (§ 21A) prohibits a member of a municipal board or commission from being appointed by the members of that commission or board to any position under its supervision unless there has been prior approval at an annual town meeting. A former member could not be so appointed until the expiration of thirty days from the termination of his service on the board of commission (again unless there has been town meeting approval).

CONCLUSION

We realize that much of this seems like a legal morass. Yet all of these statutory provisions, all the do's and don't's and all the various conditions, are necessary to balance various concerns. On the one hand, public service must not be seen as a closed "club" or, to put it another way, the notion that public employees "take care of their own" must be dispelled. On the other hand, public employees must not be unduly restricted merely because they work for government; government must be able to take advantage of the expertise and skills of its own employees; and, particularly at the local level, government must be able to attract people to part-time positions for little and sometimes even no compensation. These provisions, complicated as they are, strike this balance. We urge everyone in a multiple office-holding position to take a few minutes to review this chart and memo and determine if he has a problem. If any uncertainty remains, he should take the matter up with his town counsel or city solicitor.



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Notwithstanding the provisions of c. 268A, any clerk of a city or town who also serves in any other position for such city or town may in addition to any compensation to which he may be entitled as such city or town clerk receive such additional compensation for such additional services as the selectman, town meeting, town counsel or mayor and city council may provide.

This provision has been interpreted to apply to clerks only, and not their assistants. See EC-COI-84-142.

* A selectman is not eligible to be appointed to another town position while serving as selectman or for six months thereafter.

5. Finally, Governor Dukakis recently signed into law c. 459 of the Acts of 1984 which allows someone holding more than one elected position in a town to be compensated in both positions.
6. As to people not covered by the provisions discussed in paragraphs 3, 4 and 5, whether they violate the statute by having more than one position depends on
 - a. whether the positions involved are elected or appointed,
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In the paragraphs that follow, these four considerations will be discussed.

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9. It is the city council, board of aldermen, or board of selectmen, as the case may be, which alone has the authority to designate a municipal employee as a "special." The following rules or standards apply to that designation process:
 - * A Mayor, an alderman, or a city councilor can never be a "special municipal employee."

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Typically, the "special" category would include members of part-time boards and commissions or individuals serving on a consultant basis.

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- * in his capacity as a special municipal employee, he does not participate in or have official responsibility for any of the activities of the agency with which he wants to have the second job (in other words, as noted in the above chart, it is a different agency), and
- * he files a statement with his city or town clerk disclosing that he has the other job.

Second, a special municipal employee may have a second job with his own agency if

- * the city council, board of aldermen, or board of selectmen, as the case may be, approve, and
- * he files a statement with the clerk disclosing that he has the other job.

Thus, the special can have a second job with another agency just by filing the required disclosure. If he wants to have a second job with his own agency, he must file the disclosure and get the approval of the applicable board.

11. There are two exemptions in §20 that come into play for people who are not special employees. The first of these (§20(b)) would allow a municipal employee to have a second job with his city or town if all of the following conditions are satisfied:
 - a. the second job is with a completely separate agency,*
 - b. there has been public advertising for the position;
 - c. he files a statement with the city or town clerk disclosing that he has the other job,
 - d. the hours he works on the two jobs do not overlap,
 - e. the services he performs in the second job are not part of his duties in his regular job,
 - f. he is not compensated in his second job for more than 500 hours a year,
 - g. the head of the second agency certifies that no employee of that agency is available to do this work as part of his regular duties, and
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These conditions are set by the statute in order to ensure that everybody has an opportunity to seek such jobs and that the additional work is necessary and does not impinge on the employee's regular work.

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 - a. the city or town has a population under 35,000,
 - b. the head of that department certifies that no employee of his department is available to do this work as part of his regular duties, and

* In his regular position, he must not even participate in or have official responsibility for any of the activities of the second agency. Moreover, the agency for which he regularly works must not regulate the activities of the second agency.

- c. the city council, board of aldermen, or board of selectman approve.
13. Finally, a separate provision of G. L. c. 268A (§ 21A) prohibits a member of a municipal board or commission from being appointed by the members of that commission or board to any position under its supervision unless there has been prior approval at an annual town meeting. A former member could not be so appointed until the expiration of thirty days from the termination of his service on the board of commission (again unless there has been town meeting approval).

CONCLUSION

We realize that much of this seems like a legal morass. Yet all of these statutory provisions, all the do's and don't's and all the various conditions, are necessary to balance various concerns. On the one hand, public service must not be seen as a closed "club" or, to put it another way, the notion that public employees "take care of their own" must be dispelled. On the other hand, public employees must not be unduly restricted merely because they work for government; government must be able to take advantage of the expertise and skills of its own employees; and, particularly at the local level, government must be able to attract people to part-time positions for little and sometimes even no compensation. These provisions, complicated as they are, strike this balance. We urge everyone in a multiple office-holding position to take a few minutes to review this chart and memo and determine if he has a problem. If any uncertainty remains, he should take the matter up with his town counsel or city solicitor.

Comm. from Robert V. Greco, Exec. Director,
State Ethics Commission, Re: Commission
Advisory No. 7 - Multiple Office Holding on
the Local Level.

*Copy to the
City Solicitor
for*

REPORT IN ONE MONTH

In City Council,

January 28, 1985

1/28/85

*- Placed
on*

File

*letter sent to City Solicitor requesting my report
on this communication. (Letter transmitted
Communication) 1/30/85 mh (copy within)*