



City of Cambridge

CALENDAR ITEM # 1
Consent Agenda # 13

IN CITY COUNCIL
~~January 24, 1994~~
January 31, 1994

ORDERED: For the purposes of Massachusetts General Laws, Chapter 268A, all outside legal counsel, which shall mean all lawyers retained by the city to provide advice or representation to the city, its officials, or employees, and who are not employed full or part time on the payroll in the city's Law Department, shall be classified "SPECIAL MUNICIPAL EMPLOYEES."

In City Council January 31, 1994.
Adopted by a yea and nay vote:-
Yeas 7; Nays 2; Absent 0.
Attest:- D. Margaret Drury, City Clerk.

A true copy;

ATTEST:-

D. Margaret Drury

D. Margaret Drury
City Clerk



City of Cambridge

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City Clerk



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D. Margaret Drury
City Clerk

City of Cambridge

MASSACHUSETTS

In City Council

1/31

1994

CR # 1 Motion to Designate Outside

Legal Counsel Hired by the City as Special Municipal Employees

YEA	NAY	ABSENT	PRESENT	
✓				Ms. Kathleen L. Born
✓				Mr. Francis H. Duehay
✓				Mr. Jonathan S. Myers
✓				Mrs. Sheila T. Russell
✓				Mr. Michael A. Sullivan
	✓			Mr. Timothy J. Toomey, Jr.
✓				Ms. Katherine Triantafillou
	✓			Mr. William H. Walsh
✓				Mayor Kenneth E. Reeves

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C. Duehy m.s. UV/9-0
RF 0-9

City of Cambridge

MASSACHUSETTS

Charter Right #1

In City Council 1/31 1994

C. Walsh: To null

YEA	NAY	ABSENT	PRESENT	
	✓			Ms. Kathleen L. Born
	✓			Mr. Francis H. Duehay
	✓			Mr. Jonathan S. Myers
	✓			Mrs. Sheila T. Russell
	✓			Mr. Michael A. Sullivan
✓				Mr. Timothy J. Toomey, Jr.
	✓			Ms. Katherine Triantafillou
✓				Mr. William H. Walsh
	✓			Mayor Kenneth E. Reeves

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CITY OF CAMBRIDGE

Office of the City Solicitor

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Cambridge, Massachusetts 02139

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Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

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Assistant City Solicitor

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

Laura H. Yager
Legal Counsel

Linda A. Stamper
Legal Counsel

Arthur J. Goldberg
Legal Counsel

January 18, 1994

Robert W. Healy
City Manger
City Hall
Cambridge, MA 02139

Re: *Special Municipal Employee Status for Outside Counsel*

Dear Mr. Healy:

As you know, we have asked the City Council in the past to take a vote to designate "outside counsel" as special municipal employees pursuant to M.G.L. c. 268A. The Counsel has not yet taken such a vote. The issue has presented itself once again in the retention of outside counsel to provide an opinion regarding the appointing authority for the Executive Director position at the Election Commission.

I think the hesitancy on the part of the Council stems from a misunderstanding of the nature of such a designation under the statute. M.G.L. c. 268A, §1(n) defines a "Special Municipal Employee" as follows:

(n) "Special municipal employee", a municipal employee who is not a mayor, a member of a board of aldermen, a member of a city council or a selectman in a town with a population in excess of ten thousand persons, and whose position or employment has been expressly classified by the city council, or board of aldermen if there is no city council, or the board of selectmen as that of a special municipal employee under the terms and provisions of this chapter. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than

eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.

The statute defines "municipal employee" very broadly as follows:

(g) "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, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

The primary advantage of being designated a "special municipal employee" appears in M.G.L. c. 268A, §17(c). That section generally prohibits a "municipal employee", except in the proper discharge of his or her official duties, from acting as agent or attorney for anyone other than the city in prosecuting any claim against the same city, or as agent or attorney for anyone in connection with any particular matter in which the same city is a party or has a direct and substantial interest. Section 17(c) goes on to provide, however, that a "special municipal employee" is subject to such restrictions only in relation to a particular matter (a) in which he or she has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his or her official responsibility, or (c) which is pending in the municipal agency in which he or she is serving. There are other provisions in the statute regarding "special municipal employees", but with regard to the issue of outside counsel this provision in §17(c) is the crucial one.

Essentially, the problem is that the definition of "municipal employee" is broadly defined and certainly includes so-called "outside counsel" retained by the city to provide legal advice or representation to the city or its officials. Frequently when we contact outside counsel and negotiate to retain their services for the city, they request designation as "special municipal employee" in order not to unnecessarily restrict their own or their partners' practice or potential practice before various agencies of the city. An example would be where we hire an attorney in a large firm to advise us on environmental issues with regard to city-owned property. Technically, without designation as "special municipal employee" that attorney, and all of the partners and associates in the firm, might be precluded from representing a client in the application for a building permit for a wholly unrelated project. With a "special municipal employee" designation members of the firm would likely be able to represent such a client. The inability to assure an attorney of the designation of "special municipal employee" hampers our ability to seek out the best qualified counsel.

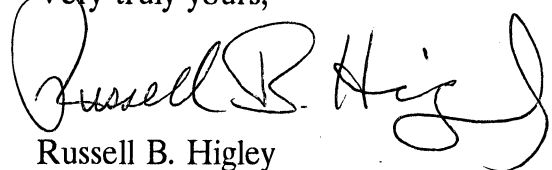
Further misunderstandings arise regarding the process necessary to designate outside

counsel as special municipal employees. The statute itself clearly provides that the "position or employment" must be expressly classified as special municipal employee. The State Ethics Commission, charged with interpretation and administration of the statute, has interpreted the statute to require that the "position" must be designated special, not the individual. For example, the City Council may not designate a single member of the Board of Zoning Appeals as a special, but must designate all members of the Board.

In the context of outside counsel it is my opinion, and that of the Ethics Commission staff that we have contacted, that the proper manner for designation of outside counsel would be for the City Council to designate all outside legal counsel retained by the City to provide legal advice or representation to the City or its officials as special municipal employees. While this approach is dictated by the statute itself, it also provides a safeguard against any inconsistent application of the designation to any particular attorney or firm.

I would emphasize that the designation of "special municipal employee" does not absolve the designee of all restrictions against conflicts of interest. In fact, it only relaxes some of the broader restrictions imposed on regular employees, and it appears to be a recognition by the legislature that cities would be hampered in retaining consulting services from lawyers and others if the consultants and their partners would be precluded from representing other clients before other agencies of the city in unrelated matters. I believe that the Council should act favorably on this designation to assure maximum availability of legal services to the City. Making this status available to all outside counsel will not in any way influence the criteria for selection of counsel, but will broaden the pool of talent from which the City may choose.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Russell B. Higley". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Russell B. Higley



CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300
FAX. 349-4307

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

January 24, 1994

To The Honorable, The City Council:

I am hereby transmitting a communication from City Solicitor Russell B. Higley, requesting a vote by the City Council to designate "outside counsel" as special municipal employees pursuant to M.G.L. c. 268A.

I strongly recommend that you vote in favor of this request.

Very truly yours,

Robert W. Healy
City Manager

RWH/mev
attachment

S-20

Consent Agenda #13

Transmitting communication from R.W. Healy
relative to the Communication from City
Solicitor Russell Higley requesting a vote
by the City Council to designate "outside counsel"
as special municipal employees pursuant to
M.G.L. c. 268A.

1/31/94 Order adopted

7-2-0.

In City Council January 24, 1994

Charter right exercised
by Councillor Walsh

2/2/94 Copy sent to RWH
Wpt. @