

CITY OF CAMBRIDGE

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April 3, 1981

Melvin H. Chalfen, M.D.
Assistant Medical Director
Massachusetts Institute of Technology
77 Massachusetts Avenue
Cambridge, MA 02139

Re: Commissioner of Health and Hospitals
Conflict of Interest

Dear Dr. Chalfen:

You have requested my opinion, pursuant to G.L. c. 268A, §22 regarding whether there would be a conflict of interest if you became Commissioner of Health and Hospitals in Cambridge, and also continued in the Medical Department at M.I.T., "to see those M.I.T. patients I have taken care of for many years." You also state that you will resign your position as physician in charge of the M.I.T. Environmental Medical Service, and that you have recently been asked to be an incorporator of the Mt. Auburn Hospital.

I have read a Draft Memorandum of Understanding, which I understand you prepared, and which sets forth additional facts regarding your intentions. Regarding your position as incorporator of the Mt. Auburn Hospital, as well as being on its active medical staff, it is my understanding that you have no financial interest in the Hospital and that you receive no compensation from it.

In preparing this opinion, I have relied on the facts set forth in your letter and in the Draft Memorandum (copy attached) and on my understanding regarding those facts. If any of these is incorrect, please let me know.

DUTIES OF THE COMMISSIONER

At the outset, I note that §11-2(a) of the Cambridge Ordinances provides:

Section 11-2(a):

The Commissioner shall not engage in the private practice of medicine and shall devote his entire time to the performance of the duties of Commissioner.

Section 11-2(b) states:

The Commissioner shall be responsible for promoting and protecting the health of the citizens of Cambridge. The Commissioner shall see that, within the city, the laws of the Commonwealth, including regulations, and the Ordinances of the city pertaining to public health, hospitals and housing are faithfully executed and enforced. The Commissioner shall have overall charge of all city operated health care programs and treatment facilities.

Section 11-2(k) states, in part:

The Commissioner...shall coordinate the delivery of care by city and private health providers; shall monitor the quality of private facilities such as hospitals, nursing homes, day care centers, and community residences...

The other duties and powers of the Commissioner are covered in §§11-2(b) through 11-2(i) and §§11-2(k) through 11-2(n) of the Ordinances.

Section 11-2(n) as added by Ordinance No. 901, (11-13-78) states:

The position of Health Commissioner is a full time job and must be treated as such. Therefore, there shall be on file in the City Clerk's Office, for public record, a Memorandum of Understanding between the City Manager and the Health Commissioner concerning any professional activities for remuneration which are not strictly related to the duties of Commissioner as set out elsewhere in this Ordinance.

It is my understanding that you will enter into a formal Memorandum based on the Draft which is attached hereto.

DISCUSSION

The terms "municipal employee" and "municipal agency" are defined in G.L. c. 268A, §§1(g) and 1(f), and, under these definitions, it seems clear that the Commissioner of Health and Hospitals of Cambridge is a "municipal employee", and, therefore, comes within the jurisdiction of c. 268A.

The first of the three substantive sections of c. 268A which is of concern in §17, which provides, in relevant part, as follows:

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

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A special municipal employee shall be subject to (paragraph (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...

Criminal sanctions are provided for violation of this section.

The crux of §17(a) lies in the phrase "any particular matter in which the same city or town is a party or has a direct and substantial interest." Thus, you could not receive compensation from M.I.T. in relation to any particular matter in which Cambridge is a party or has a direct and substantial interest, during the period of your service as Commissioner.

"Particular matter" is defined as follows:

any judicial or other proceeding,
application, submission, request
for a ruling or other determination,

contract, claim, controversy, charge,
accusation, arrest, decision, deter-
mination, finding...

G.L. c. 268A, §1(k)

Here, the "particular matter" would have to be the contract between you and M.I.T. under which you care for your "cadre of M.I.T. patients."

It is clear that Cambridge is not a "party" to this contract. Does Cambridge have a "direct and substantial interest" in it? I have been able to find only one reported case which interprets this language as it pertains to a municipality, Commonwealth v. Canon, 373 Mass. 494, 368 N.E. 2d 1181 (1977). There, the "particular matter" was the granting of a special permit for an apartment project. The Court said,

As to the city's "interest" in the granting of the special permit, we think it is clear that the "interest" need not be financial. Cf. G.L. c. 268A, §4, where there is explicit reference to a "financial interest." It is hard to hypothesize a "particular matter" involving municipal action in which it can be said with assurance that the municipal interest is indirect or insubstantial. Certainly the city's interest in the proper sewerage for a major apartment development was neither remote nor inconsequential....

373 Mass. at 498; 368 N.E. 2d at 1183-1184. I note, that, on the facts which we have, your contract with M.I.T. does not involve municipal action, at least in the sense in which that term was used in Canon. Although the absence of municipal action does not guarantee the lack of "direct and substantial interest", it certainly diminishes the likelihood of such an interest existing. As the alleged matter of interest to the municipality becomes increasingly speculative, abstract and hypothetical, the interest cannot but become less direct and substantial.

General Laws, c. 268A, §19 states:

(a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his

knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

(b) It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official 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, or...(3) if, by statute, the financial interest has been exempted from the requirements of clause (1) as being too remote or too inconsequential to affect the integrity of municipal employees' services.

In short, this section sets out what you should do if, and, when, you participate in a particular matter in which you or any of the named persons have a financial interest. At the first suggestion of such a conflict, you should comply with the procedures set out in §19(b).

General standards of conduct are set forth in G.L. c. 268A, §23, which states, in part:

In addition to the other provisions of this chapter, and in supplement thereto, the following are established as standards of conduct for all state, county, and municipal employees for the violation of which appropriate

administrative action as is warranted may be taken by the appropriate constitutional officer or by the head of a state, county, or municipal agency. No officer or employee of a state, county, or municipal agency shall:

(a) accept other employment which will impair his independence of judgment in the exercise of his official duties.

(b) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

(f) pursue a course of conduct which will raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

Subsection (b) could pose problems. For example, if you have a duty to your patients to notify them of any health hazards which may affect them, and if you learn of such hazards confidentially in your role as Commissioner, you may face a conflict under this paragraph. Perhaps this situation could be best addressed by a side agreement between you and the City in which you agree not to participate in your official capacity in any situations which are likely to compromise your professional responsibilities, and if, by removing yourself from such situations, you were no longer able to function effectively in your municipal position, then you would agree to resign from one of your two positions.

Paragraphs (a) and (f) set out vague standards, which were enacted "to prevent giving the appearance of conflict..." Board of Selectmen of Avon v. Lincoln, 352 Mass. 581, 583 227 N.E. 2d 359, 360 (1967). One Advisory Opinion of the State Ethics Commission which invoked §§23(a) and (e) did so because the employee's "employment relationship with a Medicaid provider would also give a reasonable basis for the impression that you could be improperly influenced or affected by your private employer in the performance of your official duties." EC-C01-80-17.

The only Ethics Commission Advisory Opinion which discusses §23 and which contains facts similar to those of our case is EC-COI-80-9. In that case, the Commission said that a state employee who administers a unit of a state agency responsible for inspecting certain types of plants, and examining and licensing plant employees, may not be employed in his off-duty hours as the chief engineer of the plant of a private facility.

OPINION

My conclusions are as follows:

1. Under §11-2(n), a Memorandum of Understanding should be entered into by you and the City Manager in which you set out any professional activities into which you are going to enter and for which you are to receive remuneration and which are not strictly related to the duties of Commissioner. I do not believe that your providing medical services on a part-time basis to private patients in a private setting would be "strictly related" to your duties as Commissioner.

2. Regarding G.L. c. 268A, §17(a), it is my opinion that your compensation from M.I.T. for taking care of your private patients does not constitute compensation "in relation to any particular matter in which (Cambridge) ...has a direct and substantial interest" if certain criteria are met. In reaching this conclusion, I rely, in part, on a 1979 State Ethics Commission decision (EC-COI-79-129), involving a state employee, with similar facts.

In that decision, it appeared that X, a full time employee of a state agency, ABC, administered the delivery of services in a local area. In his private capacity, X counseled clients of XYZ, a private mental health out-patient clinic. X's employment contract with XYZ precluded him from counseling any individuals "who directly or indirectly receive DPW aid." (I assume DPW refers to Department of Public Welfare.) There were also no contracts between XYZ and the Commonwealth. It also appeared that the treatment provided by X was neither publicly funded nor related to any state grant, and that X did not treat ABC clients. On these facts, X's compensation was held not to be a particular matter of direct and substantial interest to the state.

Based on this opinion, and assuming that the Commissioner's office has no direct responsibility over your work at M.I.T., your compensation would not be considered to be in relation to a particular matter of direct and substantial interest to the City if the following criteria are met:

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1. Your patients at M.I.T. do not receive any aid from any department of the city.

2. M.I.T. has no contracts with Cambridge in the area of your responsibilities as Commissioner.

3. You do not treat any employees of Cambridge.

As your work at M.I.T. is for only a minimal number of hours, is in the private sector, and since you have severed all other connections with M.I.T., your relationship with M.I.T. is, at best, so peripherally involved with the Commissioner's responsibilities, that in my opinion, it does not come within the Commissioner's "direct responsibility."

3. General Laws, c. 268A, §§19 and 20.

As noted above, if you find that you are about to engage in the conduct described in §19(a), you should follow the procedures set out in §19(b). The same considerations apply with regard to §20.

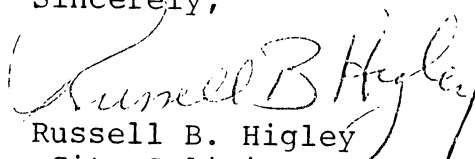
4. General Laws, c. 268A, §23.

I have already noted one problem which could arise under §23(b). Perhaps this could be handled in the Memorandum of Understanding, or in a side agreement, as noted above.

In order to comply with §23(f), I suggest that you resign your position as incorporator of the Mt. Auburn Hospital.

With these two exceptions, it is my opinion that the standards set forth in §23 will not be violated.

Sincerely,


Russell B. Higley
City Solicitor

RBH:jl

Enc.

DRAFT
MEMORANDUM OF UNDERSTANDING

It is understood that the position of Commissioner of Health and Hospitals is a full time position in the strict sense, 40 hours a week, in the full sense availability and participation as appropriate 7 days a week.

Inasmuch as it would be a hardship for personal, professional and financial reasons to sever M.I.T. Medical Department connections completely, I would continue as a part time salaried M.I.T. employee, to care for the cadre of M.I.T. patients I have cared for over many years. This activity is strictly patient care and necessary to continue professional clinical skills.

The amount of time necessary is in the range of 13-15 hours a week spread over different days of the week. In my opinion, this time will not interfere with the execution of the responsibilities of the role of Commissioner of Health and Hospitals

In order to avoid any conflict of interest, I will resign my other responsibilities as follows, Physician In Charge of the M.I.T. Environmental Medical Service, Director of the M.I.T. Radioactivity Center, Chairmanship of the M.I.T. Committee on Assessment of Biohazards, membership on other M.I.T. Health and Safety Committees. In addition, I will resign from a non M.I.T. Medical Director position I now hold. If thought appropriate, I will resign as an Incorporator of the Mt. Auburn Hospital although I feel this position is a benefit for the Commissioner position rather than a conflict of interest.

I will continue to serve as a Councilor of the Massachusetts Medical Society, retain my position as a member of the Active Medical Staff of the Mt. Auburn Hospital and as a member of the Board of Directors of the Cambridge Chapter of the American Red Cross and the Cambridge Unit of the American Cancer Society.

Further to avoid conflict of interest of any issues which arise as part of the Department of Health and Hospitals responsibilities in regard to regulations affecting M.I.T. will be referred to and managed by the City Manager.

S-2124

Comm. from Paul E. Healy, City Clerk, trans.
Comm. from Russell B. Higley, City Solicitor
Re: conflict of interest opinion regarding
Dr. Melvin Chalfen, Asst. Medical Dir., MIT
as Comm. of Health & Hospitals.

In City Council,

April 3, 1981