

**COMMONWEALTH OF MASSACHUSETTS
ETHICS COMMISSION**

POLITICAL ACTIVITY

CHAPTER 268A

• **Introduction**

The purpose of this Advisory (1) is to explain to public employees (i.e., all current officers and employees of Massachusetts state, county, and municipal government agencies, elected and appointed, full-time and part-time, paid and unpaid) how the conflict of interest law applies to their political activities. The term "political activity" includes, but is not necessarily limited to, any activity that is in support of or opposition to a federal, state or local candidate or political party or a state or local ballot question.

In most cases, public employees are free to engage in political activities on their own time as individuals, subject to the limitations discussed in this Advisory (including the campaign finance law's, G.L. c. 55, prohibition against political fundraising in public buildings and by appointed, compensated public employees). Nothing in the conflict of interest law prohibits a public employee from running for any public office, including seeking re-election.(2) The conflict of interest law does not require a candidate to take a leave of absence from his or her public job, but the employee's own agency may require such a leave or establish other limitations stricter than those of the conflict of interest law. If a public employee is elected to another public office, certain restrictions (not discussed in this Advisory) may apply to holding both jobs at the same time; the Commission's Legal Division can provide advice about multiple office holding.

Conversely, public employees may not engage in political activities on public time. Public resources and the tax dollars that fund such resources are to be used for governmental purposes; not for political activity. Public resources include paid staff time, facilities, supplies and equipment.

For the first three subjects discussed in this Advisory (campaign use of public resources, campaigning on the job, and solicitation and fundraising), the campaign finance law often, but not always, establishes stricter requirements than the conflict of interest law. The state Office of Campaign and Political Finance (OCPF) administers and enforces the state campaign finance law, and can provide complete advice about its interpretation. At times, these two laws have overlapping jurisdiction. In such cases, public employees must comply with both laws.

Section 23 of the conflict of interest law contains prohibitions that apply to all public employees in the Commonwealth. Two of those prohibitions provide that public employees may not, knowingly or with reason to know:

- use or attempt to use their official position to secure unwarranted privileges or exemptions of substantial value for themselves or others (section 23(b)(2)); or

- act in a manner that would cause a reasonable person to conclude that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are likely to act or fail to act as a result of kinship, rank, position or influence of any party or person. Importantly the law also provides that it is unreasonable to so conclude if the public employee has disclosed in writing to his or her appointing authority or, if no appointing authority exists, as is the case for elected officials, discloses in a manner that is public in nature, the facts that would otherwise lead to such a conclusion. (section 23(b)(3))

- **Summary**

As explained in detail below, the Massachusetts conflict of interest law (3) prohibits all public employees, whether compensated or not, from:

- using any public resources including staff, facilities, or the state seal or coat of arms, for campaign purposes;
- engaging in any political activities during their normal public working hours;
- using their authority to solicit campaign contributions or services, or anything else of substantial value from subordinate employees, vendors they oversee, or anyone within their regulatory jurisdiction; or
- representing a campaign (or anyone else) in connection with some matter in which the employee's own level of government (state or local) has a direct and substantial interest (unless they are "special" employees).

In considering whether an activity is an appropriate governmental activity or an activity that is a predominantly political activity, answers to the following questions may be helpful:

- Is the activity reasonably related to or in support of the official's statutory duties?
- Is the political activity incidental to the governmental activity in a way that involves minimal or inadvertent overlap?
- Is the expense to the government created by the political activity de minimus?(4)

Determining whether an activity is predominantly political or governmental depends on the particular facts of each case. The Commission recognizes that this determination can be difficult. Whenever there is a question whether an activity is political or governmental in nature, public employees should seek prospective advice from the Commission regarding such an activity.

- **Campaign Use of Public Resources**

The use of public resources of substantial value (\$50 or more), available by virtue of one's public employment, for the purpose of conducting, supporting or opposing a candidate or otherwise engaging in a political activity is the use of one's official position to secure an unwarranted privilege for oneself or another.(5) These resources include staff time, publicly provided stationery, office supplies, utilities, telephones, office equipment (e.g. copying machines, typewriters, word processors, fax machines, e-mail), office space or other facilities.(6) These are intended for the conduct of public business, not for conducting political activity or otherwise advancing the political interests of public employees. Thus, political activity that is not

in furtherance of the purpose for which government funds were appropriated is prohibited. Elected officials should take appropriate steps to keep separate official and political activities and to ensure that political and campaign activities take place outside of their public offices.

The Commission recognizes that, in some cases, the use of public resources may be incidental to the officially related duties of a public official, for example, when the public official's staff needs to coordinate with the official's campaign scheduler. In such instances, staff time should be limited as much as is practicable. In circumstances where the use of public resources becomes more than incidental, the matter should be referred to the campaign. For example, if a series of questions to or an interview of a public press officer by a member of the media becomes predominantly focused on a political campaign, the press officer should conclude the interview by referring the media representative to the campaign for further discussion. A public employee or his/her staff should not engage in proactive political activity using public resources. For example, state employees who are required to be with elected officials at a political event, e.g., for security purposes, may not perform political activities such as distributing campaign materials at a political event. In addition, public resources may not be utilized to:

- write political or campaign speeches;
- set up or hold a press conference or press availability the predominant purpose of which is to endorse, promote or oppose a federal, state, county or municipal candidate;
- conduct campaign polls or to answer campaign questions;
- create databases of potential campaign supporters;
- conduct campaign research or photocopying for such purposes;
- create or maintain a campaign website or even create a link from a governmental website to a campaign website.(7)

Moreover, the Commission has ruled that candidates who are public officials or employees may not use the state seal (or state "coat of arms") even on privately purchased stationery, for fundraising or other campaign purposes. The seal may be used solely for official state purposes, not for the private purpose of a campaign.

Finally, if a policy, rule or regulation prohibits the use of a public facility or public resources, such a use would be an unwarranted privilege. For example, the Bureau of State Office Buildings manages the state office buildings located at the Government Center Complex in Boston including the State House, John W. McCormack, Charles F. Hurley and Erich Lindemann Buildings. The Bureau's policy manual states, "Activities in support of political candidates or ballot questions are not permitted on Bureau grounds."

- **Campaigning on the Job**

Public employees may not engage in political activities during their normal working hours. While employed by the taxpayers, they are to be doing the taxpayers' work, and not politicking for themselves or individual candidates, or in support of or opposition to election ballot questions. For appointed public employees, normal working hours are those set by the employer through regulations or otherwise, or as designated in the applicable collective bargaining agreement. Where such hours have not been clearly defined, the employee is responsible for resolving any ambiguity with his or her appointing official before engaging in political work.

- **Solicitation and Fundraising**

The conflict of interest law forbids public employees from soliciting anything of substantial value from those they oversee, because of the "inherently coercive" nature of such solicitations. The Commission has applied this principle to political campaigns. Thus, public employees may not solicit campaign assistance from persons they regulate or who are under their supervision. For example, they may not use their official title or authority, or their presence at a meeting under coercive circumstances, to solicit non-monetary campaign assistance. They may also not solicit private, paid business relationships with such persons they oversee (including, for example, the provision of paid political consulting services).

If persons under the public employee's jurisdiction wish to enter into such a private business relationship with the public employee, the public employee must publicly disclose in writing the existence of the private business relationship, and the facts that the person under his jurisdiction initiated it and entered into it entirely voluntarily.

The same principle applies to campaign fundraising. Thus, appointed public employees (whether compensated or not) may not solicit political contributions from other public employees whom they supervise, vendors that they oversee, or anyone over whom they may have regulatory power. The Commission has not addressed whether this prohibition applies to elected officials except in situations where there has been an express or implied link between the making of a contribution and a subordinate's appointment or employment..(8) In addition, sections 2 and 3 of G.L. c. 268A prohibit both appointed and elected public officials from soliciting or accepting campaign contributions or political services in return for being influenced in their official acts. In re Nolan, 1989 SEC 415. See Commonwealth v. Borans, 379 Mass. 117, 142 (1979). See also G.L. c. 55, sections 16-17; c. 56, sections 33-36 (criminal statutes not enforced by Commission).

It should be noted again that the most significant restrictions on campaign fundraising by Massachusetts public employees are not enforced by the State Ethics Commission; they are found in the state campaign finance law which is administered by OCPF. Among other things, these restrictions prohibit public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone; prohibit anyone from giving, soliciting, or receiving political funds in any public building; and forbid requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF.

ENDNOTES

1. The Commission issues Advisories periodically to interpret various provision of the conflict of interest law. Advisories respond to issues that may arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law.

2. The federal Hatch Act applies to state and local employees who are principally employed in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency. In some instances, the Hatch Act may prohibit such employees from becoming candidates for public office in a partisan election; using official authority or influence to interfere with or affect the results of an election or nomination or directly or indirectly coercing contributions from subordinates in support of a political party or candidate (see Appendix B).

3. In addition, as explained below, the state campaign finance law sometimes establishes stricter requirements. Among other things, it prohibits public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone; prohibits anyone from giving, soliciting, or receiving political funds in any public building; and forbids requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF (see Appendix B).
4. The Commission has ruled that anything with a monetary value of less than \$50 is not of substantial value.
5. Although the State Ethics Commission has reached the conclusions in parts I and II under the state conflict of interest law, G.L. c. 268A, section 23(b)(2), OCPF has reached similar conclusions under the state campaign finance law as interpreted by a state Supreme Judicial Court decision, *Anderson v. City of Boston*, 376 Mass. 178 (1978), appeal dismissed, 439 U.S. 1069 (1979). For complete details, contact OCPF. Note that the campaign finance law and *Anderson* prohibit campaign use of public resources even if they are not of "substantial value."
6. Public facilities that are in fact available to the general public for use may be available for conducting certain political activities in accordance with the terms and conditions of the facility and on an equitable basis.
7. In Interpretive Bulletin 95-03, the Office of Campaign and Political Finance concluded, "An elected official or the official's staff may use public resources to produce and distribute information to constituents regarding the official's position on issues if the activity is consistent with the official's responsibilities. Elected officials and their staff may also use public resources to respond to criticism of the official's record, even from opponents, provided such use is reasonable and proportionate in scope. Public resources may not be used to attack the candidacy of an opponent."
8. See advisory opinion EC-COI-92-12, footnote 10, Public Enforcement Letter 95-2 (sheriff violated G.L. c. 268A, section 23(b)(2) by combining official swearing-in ceremonies for deputy sheriffs with political campaign fundraising events) and *In the Matter of Michael Bencal*, 2006 SEC ____, (city councilor violated the same section by soliciting a contribution from municipal employee to assure his continued employment).