

Don Johnson4/25/05
13

From: Don Johnson
Sent: Wednesday, April 20, 2005 2:54 PM
To: All Boards and Committees
Cc: All Department Heads; Board of Selectmen
Subject: Recusal of Board and Committee Members

Dear Board/Committee Member:

In recent weeks and months there have been several questions with respect to how a board or committee member should act if they are recused on any matter due to a conflict, or the appearance of a conflict. Shortly before Town Meeting the Chairman of the Board of Selectmen asked staff to prepare a draft policy in this regard for the Board's consideration. That draft has not been completed as yet. As soon as the Selectmen establish this policy, we will share it with all members of all boards and committees. In the meantime, we have given verbal direction to those staff members who provide staff support to boards and committees and asked them to advise you accordingly. Even so, there is apparently still a significant degree of disagreement with (or lack of understanding of) the Ethics Law and the restrictions that apply to board and committee members related to conflict.

In order to help those who are having difficulty in this area, I have attached a draft letter from Town Counsel speaking to this issue. I stress that it is a draft and has been prepared as background for part of the policy that the Selectmen will be considering. Even so, it is quite instructive and may help some folks to better understand the law. Also, the following is an excerpt from a portion of another communication from Town Counsel that will give you an idea as to how the Supreme Judicial Court sees this issue:

"As a follow-up, in *Graham v. McGrail*, 370 Mass. 133, 138 (1976), the SJC stated: 'Ordinarily, the wise course for one who is disqualified from all participation in a matter is to leave the room.' So that is the SJC's view of what is 'wise,' the admonition came in the context of a discussion of whether the disqualified member could be counted toward a quorum (with the Court concluding that the member should not be counted)."

As you can see, the Supreme Judicial Court takes the position that, not only should a recused person have no interaction with their board or committee on the particular subject from which they are recused, they would have the individual physically leave the room.

Until such time as the Selectmen promulgate their policy in this regard, if you have any questions, or need further clarification, please feel free to contact my office or any member of the Board of Selectmen. Our concern is to help you avoid being inadvertently caught in a conflict under the Ethics Law. Violations (and any enforcement penalties) are applied directly against the individual, not the Town. As such, it is incumbent on individuals to police themselves carefully or run the personal risk.

Regards,
Don Johnson

4/22/2005

DRAFT

MEMORANDUM

TO: Don P. Johnson, Town Manager
FROM: Stephen D. Anderson, Town Counsel
RE: Recusal Under the State Ethics Act
DATE: April 9, 2005

You have asked for some general guidance regarding recusal of a member of a Town board or commission under the State Ethics Act, G.L. c. 268A.

There are many reasons why a member of a Town board or commission should recuse himself or herself under the State Ethics Act from participating in a particular matter pending before the board or commission. Examples include, without limitation, the following:

- **Financial Interest:** The member (and/or his immediate family, his partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any prospective employer) cannot have a financial interest in the particular matter in which the member is asked to participate. See G.L. C. 268A, §19 (this disqualification is subject to cure by disclosure to and consent from the appointing authority).
- **Outside Activities:** The member cannot participate in any particular matter pending before his board or commission in which he (a) directly or indirectly has received or requested compensation from anyone other than the town, or (b) acted as an agent or attorney for anyone other than the town. See G.L. C. 268A, §17 (the disqualification of this section is relaxed in certain respects for special municipal employees).
- **Appearance of Impropriety:** The member cannot “act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.” See G.L. C. 268A, § 23(b)(3) (this disqualification is subject to cure in certain circumstances by disclosure to the appointing authority and/or in the minutes of the meeting).

If there are grounds for recusal (or if the member has recused himself or herself in an abundance of caution), the member cannot and should not participate in the particular matter personally and substantially “through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” See G.L. C. 268A, §1 (definition of “participate;” emphasis added). The recused member should, with respect to the matter, refrain from personally and substantially (a) voting, (b)

deliberating, (c) making any recommendation, (d) providing any advice, or (e) conducting any investigation into the matter. As a practical matter, the recused member should absent himself or herself altogether from the meeting(s) at which the particular matter is discussed.

Nor is it sufficient that the member recuses himself or herself and then purports to participate in the meeting or hearing in his or her individual capacity by making recommendations or providing advice (orally or in writing) to the board or commission. Not only does this have the potential to expose the member to penalties under c. 268A, but also such participation may constitute “grounds for voiding, rescinding or canceling the action” taken by the board or commission in which such participation has occurred “on such terms as the interest of the municipality and innocent third persons require.” See G.L. C. 268A, § 21.

As a “last resort” in the “narrow circumstances” where “a municipal body cannot obtain the quorum necessary to take action because of disqualification based on conflicts of interest under G.L. c. 268A,” the rule of necessity 268A may provide a “mechanism by which all members may act notwithstanding any conflicts of interest:”

The rule of necessity was established by courts to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice or interest when no other official or agency is available to make that decision. See *Moran v. School Committee of Littleton*, 317 Mass. 591, 594 (1945); *Graham v. McGrail*, 370 Mass. 133, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to GL. c. 268A); see also *Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272 (1990).

See, e.g., EC-COI-99-4 (and opinions cited).

As the State Ethics Commission noted in EC-COI-99-4 and EC-COI-92-24, use of the rule of necessity should be noted in the minutes of the meeting at which it is invoked and, in order to satisfy the requirements of § 23(b)(3), the otherwise disqualified member should, if possible, make an advance written disclosure, to be filed with the Town Clerk, of the relevant facts that created the conflict of interest and necessitated use of the rule in order to obtain a quorum. See EC-COI-93-3. If such an advance written disclosure is not possible, the member should include a § 23(b)(3) disclosure in the minutes of the meeting. In addition, § 23(b)(2) is relevant, providing that no public employee may use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. Therefore, if the disqualified member participates in reviewing the matter based on the rule of necessity, he must apply objective criteria. Finally, the board or commission cannot invoke the rule of necessity if the meeting can be rescheduled and a quorum obtained without the recused member’s participation.