

## **ADVISORY 13-1: MAKING AND RECEIVING RECOMMENDATIONS FOR PUBLIC OR PRIVATE EMPLOYMENT**

The Ethics Commission is required by statute, G.L. c. 268B, § 3(g), to provide advice to those who request it on how the conflict of interest law, G.L. c. 268A, applies to their future conduct. In addition to providing individualized advice, from time to time, the Commission issues Advisories to provide general advice on discrete topics to as many people as possible. This Advisory provides the Commission's best guidance on how public employees may comply with the conflict of interest law when they make and receive recommendations for public or private employment. A public employee who follows the guidance in this Advisory will not violate the conflict of interest law and will not be prosecuted by the Commission. A public employee who chooses not to follow the guidance in this Advisory will not automatically violate the law, but, in such instances, the Commission may need to determine whether a violation has occurred based on the specific facts.

### **I. *Recommendations by Appointed Public Employees***

Under c. 268A, § 23(b)(2), public employees may not knowingly use their official positions to give or attempt to give anyone an unwarranted privilege of substantial value,<sup>1</sup> which is not properly available to similarly situated individuals. An appointed public employee who is authorized by her public agency to make recommendations does not violate § 23(b)(2) by using her public position to recommend for employment a person who currently works with her at that public agency, or who has worked with her in the past at that public agency, or with whom she has had professional dealings in her current public position; provided that she has reason to believe, based on those contacts, that the job applicant is qualified for the position for which he is applying. The public employee may sign the recommendation using her public title, and the recommendation may be on official agency letterhead, as long as her knowledge of the job applicant's qualifications arises from her employment with her current public employer as described above. The recommendation should be based on the public employee's personal knowledge of the job applicant's work performance and ability, may not be accompanied by pressure (see Section III below), and may not be directed at an employer prohibited from receiving public employee recommendations under G.L. c. 271, § 40 (see Section V below).

If an appointed public employee is asked to recommend someone whom he knows from somewhere other than his current public position, he may do so only in his private capacity. In general, except for judges, as discussed below, an appointed public employee may not use his current official title or official letterhead to recommend persons whom he knows from some context other than his current official position, because it is not part of his current public duties to recommend such persons. However, the public employee may send, in his private capacity, and without using his public title, letterhead, telephone or email, a private letter stating his personal recommendation. The public employee may refer to his prior position and title in a private letter of recommendation to explain how he knows the former co-worker. In certain limited

circumstances, the public employee may refer to his current position and title in the body of the private letter, if his current position is relevant to some substantive aspect of the recommendation.

Judges subject to the Code of Judicial Conduct, Supreme Judicial Court Rule 3:09, may participate in their official capacity in the process of judicial selection by writing letters of recommendation and providing comments and testimony in support of applicants and nominees for judicial office without violating the conflict of interest law. A judge who participates in a judicial selection process by written or oral communications on behalf of an applicant or nominee pursuant to Rule 3:09, Canon 2B, is not providing the applicant or nominee with an "unwarranted" privilege, because conduct explicitly authorized by statute or regulation is not "unwarranted" for purposes of the conflict of interest law, *EC-COI-12-1*. The Rules of the Supreme Judicial Court are comparable to regulations for these purposes. Accordingly, a judge may use his or her official title and letterhead to recommend an applicant or nominee for judicial office (including the position of clerk-magistrate) of whom the judge has personal knowledge, and may do so based on familiarity with the applicant or nominee acquired before or while the judge held his or her current public position.

## II. *Recommendations by Elected Public Employees*

An elected public employee may use his public position to recommend for employment a person who is a current or former employee of the elected public employee in the office in which he is currently serving, or a person whose qualifications for employment the elected public employee learned in the course of his current public duties, provided that the elected public employee has reason to believe, based on those contacts, that the job applicant is qualified for the position for which he is applying.

### Recommendations of Constituents

Elected public employees may also use their public positions to recommend their constituents. "Constituent" is not defined in the General Laws, nor is it defined in Commission precedent. Because elected public employees may have responsibilities to Commonwealth residents outside their specific districts, for purposes of the conflict of interest law, the Commission will consider an elected public employee's constituents to be any person residing in the Commonwealth, whether or not they reside in the elected public employee's specific district, county, or city or town. As with any other official action by an elected public employee, recommending a constituent for employment is subject to the conflict of interest law.

To comply with the prohibition against giving unwarranted privileges imposed by § 23(b)(2), an elected public employee should have some reason to believe that the constituent possesses the minimum qualifications for the position for which he is being recommended. The elected public employee may already be familiar with the constituent's qualifications for the desired position. If not, the elected public employee should obtain sufficient information to satisfy himself that the constituent possesses the

minimum qualifications for the position before making the recommendation. While the elected public employee is not required to interview a constituent before recommending him, the elected public employee should ascertain whether the constituent has the minimum qualifications for the position sought. An elected public employee may accomplish this by requiring any constituent seeking an employment recommendation to provide the job posting for the position sought, if one exists, and his resume, and then comparing them to determine whether the constituent meets the minimum qualifications for the position. If no job posting exists, the elected public employee should use her best judgment to determine whether the constituent meets the minimum qualifications based on the description of the position provided by the constituent and any other publicly available information.

Section 23(b)(2) prohibits public employees from knowingly providing or attempting to provide a benefit of substantial value selectively to a single individual, or to a discrete group.<sup>2</sup> In considering whether prohibited special treatment has been provided selectively, the Commission will consider whether the elected public employee has a standard practice for handling requests for recommendations from his constituents, and, if so, whether that standard practice was followed in the particular instance. Such a process should include: taking reasonable steps to determine whether the constituent has the minimum qualifications for the position, as just described; making clear in the recommendation the information on which the recommendation is based, and not going beyond that information in making the recommendation; providing the same opportunity to obtain a recommendation to any other constituent requesting one; not putting pressure on the potential employer, directly or indirectly, or personally or through others; and not making recommendations prohibited by G.L. c. 271, § 40.

The conflict of interest law does not require elected public employees to recommend, nor does it prohibit them from recommending, their constituents; it only prohibits providing recommendations selectively to some constituents, but not to others who are similarly situated. An elected public employee may choose to limit the recommendations he provides as long as those limitations are consistent for similarly situated individuals. For example, an elected public employee would not violate the conflict of interest law by declining to make constituent recommendations at all, and instead adopting a practice of using her official title and letterhead only when she is recommending persons who have worked for her, or with whom she has worked, in her current public position, and making all other recommendations only in her personal capacity, without official title or letterhead. Alternatively, an elected public employee could choose to limit her constituent recommendations only to persons residing in her district without violating the conflict of interest law, provided that, in making such constituent recommendations, she observes a standard practice for handling such requests as just described.

The conflict of interest law also does not require an elected public employee to recommend, nor does it prohibit him from recommending, multiple applicants for an available position. An elected public employee may include as part of his or her standard process for handling constituent requests for recommendations a consistent practice of

recommending only the first constituent who asks to be recommended, or the strongest candidate out of multiple candidates, and declining to provide recommendations for others seeking to be recommended for that same position.

Recommendations can and should reflect the public employee's degree of familiarity with, and knowledge of, the person being recommended. Section 23(b)(2) of the conflict of interest law does not require an elected public employee to disregard information he knows about a constituent that is pertinent to whether the person is qualified for a position, or to recommend the person even though, for example, he knows or has learned that the constituent has a history of poor job attendance. An elected public employee may decline to recommend a constituent who meets the paper qualifications for a position, when there is some objective, job-related reason for doing so. Similarly, an elected public employee will not violate § 23(b)(2) of the conflict of interest law by writing a lengthy, detailed recommendation on behalf of a former member of her staff with whose qualifications she is personally familiar, and a less detailed recommendation on behalf of a constituent whom she has determined possesses the qualifications for the job, but about whom she knows much less than she does about her former staffer. Writing recommendations that accurately reflect what an elected public employee knows or has been able to determine about a candidate for employment does not give anyone an unwarranted privilege in violation of Section 23(b)(2) of the conflict of interest law, as long as the elected public employee has determined that the candidate for employment meets the minimum qualifications for the position.

#### Immediate Family Members

An elected public employee may not use his position to recommend his immediate family member<sup>3</sup>, pursuant to the sections of the conflict of interest law that prohibit all public employees, elected or appointed, from participating in any particular matter in which an immediate family member has a financial interest.<sup>4</sup> Because a job applicant has a financial interest in employment, elected public employees may not participate in their official capacities in any hiring process in which an immediate family member seeks employment. An elected public employee is considered to "participate" in his official capacity in any matter into which he interjects himself in his official role.<sup>5</sup> Accordingly, an elected public employee who recommends an immediate family member for employment is participating in the hiring process in violation of the conflict of interest law.<sup>6</sup>

#### Appearance of a Conflict of Interest

Section 23(b)(3) of the conflict of interest law prohibits all public employees, elected or appointed, from acting in a manner that would create the appearance of a conflict of interest. Specifically, it prohibits acting in a manner that would cause a reasonable person who knew the facts to conclude that anyone can improperly influence the public employee or unduly enjoy his favor, or that the public employee is likely to act or fail to act as a result of kinship, rank, position, or undue influence. The same section

further provides that such an appearance of a conflict of interest will be dispelled if the public employee makes a public disclosure of the facts prior to acting.

An elected public employee's recommendation of a constituent with whom the public employee has no other relationship, pursuant to the elected public employee's standard practice for constituent recommendations, will not create an appearance of a conflict of interest pursuant to § 23(b)(3). However, a recommendation of a constituent who is also a personal friend, non-immediate family member, business associate, or someone with whom the elected public employee has some other comparable additional relationship, can create such an appearance. In these situations, assuming that the elected public employee has not provided any preferential treatment because of the relationship and has not applied any direct or indirect pressure in making the recommendation, the elected public employee can avoid a violation of the conflict of interest law by making a prior public disclosure of the facts to eliminate any appearance of a conflict, pursuant to § 23(b)(3).<sup>7</sup> While we recognize that job applicants may be reluctant to have the fact that they are applying for a job publicly disclosed, in some circumstances a disclosure is needed to dispel the appearance of a conflict of interest, and protect the elected public employee from a violation of § 23(b)(3). If making a public disclosure is not a feasible option, then the elected public employee may only make the recommendation in his private capacity, without use of title, official letterhead or public resources.

### III. *Recommendations Accompanied by Pressure Are Prohibited*

A recommendation will violate § 23(b)(2) if it is accompanied by pressure. Use of one's official position to exert pressure, directly or indirectly, on another to obtain or attempt to obtain employment for anyone is use of one's official position to secure an unwarranted privilege of substantial value in violation of § 23(b)(2).<sup>8</sup> Whether pressure has been applied in a given situation is fact-intensive, and the Commission will examine all of the circumstances to make that determination. In past cases, the Commission has found prohibited pressure where a public employee made a request to a person or entity with significant pending or anticipated business before the public employee, the request was made during a meeting to discuss the pending business, and the public employee expressly linked the outcome of the pending business to favorable consideration of his request. The Commission has also found pressure where a public employee made repeated requests and made reference to the public employee's power over the recipient of the request. *In Re Travis*, 2001 SEC 1014; *In Re Pezzella*, 1991 SEC 526, 528; *In Re Galewski*, 1991 SEC 504, 505; *In Re Zeppieri*, 1990 SEC 448, 449; *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), *aff'g In Re Craven*, 1980 SEC 17.

While pressure in violation of § 23(b)(2) typically is applied through the spoken word, and far less frequently through the written word,<sup>9</sup> this does not mean that the law prohibits oral recommendations, and permits only written recommendations. The law prohibits pressure. An oral recommendation unaccompanied by explicit or implicit pressure is permissible. A written recommendation amounting to or accompanied by

pressure is impermissible. Written recommendations unaccompanied by any oral contact do have an obvious advantage in that they do not require determinations as to what was said or how it was said. A person making an oral recommendation should therefore proceed with caution, since there will be no objective evidence of what she said or how she said it. The risk involved in making an oral recommendation is that the recipient of the oral recommendation may perceive it as pressure. If the Commission determines, based on the evidence, that a reasonable person would have so perceived it, the Commission may find a violation.

In determining whether a public employee's oral or written recommendation is consistent with the conflict of interest law, the Commission will consider all the circumstances to determine whether the recommendation was accompanied by pressure, in violation of § 23(b)(2) of the conflict of interest law. In addition to whether a recommendation was made in the context of other pending business, repeatedly, or with reference to the recommender's authority over the person receiving the recommendation, other factors to be considered may include, but are not limited to, the following:

- Did the public employee knowingly suggest, directly or indirectly, that factors other than the merits of the applicant and competing applicants for the position should be considered in making the hiring decision?
- Did the public employee knowingly suggest, directly or indirectly, that normal agency hiring procedures should be ignored or bypassed?
- Did the public employee knowingly recommend an individual for employment for a position that was not vacant or for a position that had not yet been created?
- How many contacts did the public employee have with the hiring agency? Weekly calls to the head of a hiring agency to "check the status" of a recommendation may amount to what a reasonable person would consider pressure, while a single call to the agency's human resources office to find out whether a recommendation was received would not.
- Did a staff member or employee of the public employee, or anyone else acting on behalf of the public employee, knowingly take any action with respect to a recommendation that the public employee himself would not be permitted to take? A public employee may not circumvent the conflict of interest law by directing or knowingly permitting others to do what he may not.
- If an employment recommendation was discussed between a public employee making a recommendation and the recipient of the recommendation, and the two have other pending business between them, who brought up the topic of the recommendation? If the topic was voluntarily brought up by the recommendation recipient in the context of a meeting to discuss some other pending business, and the public employee making the employment recommendation made no attempt to link the outcome of the recommendation to any aspect of the other business, the conversation will not be considered pressure, absent some other evidence that pressure was applied.

- If a public employee who has recommended someone for employment is contacted by the hiring employer for a reference check, and, during that conversation, does not attempt to link the outcome of the employment application to any aspect of any other business he has pending with the hiring employer, that conversation will not be considered pressure, absent some other indication that pressure was applied.
- What are the relative positions of the public employee making the employment recommendation and the person receiving the recommendation? If they stand on an equal footing, then it is unlikely that the situation will be found to involve pressure.

#### IV. *Receiving Employment Recommendations*

The sections of the conflict of interest law already discussed in this Advisory also apply to public employees receiving employment recommendations. Just as § 23(b)(2) of the conflict of interest law prohibits providing a benefit selectively to a single individual, or to a discrete group, in the context of making recommendations, it also prohibits such treatment by those who receive recommendations.

State law, specifically G.L. c. 66, § 3A, defines the process by which all recommendations for public employment in the Commonwealth must be handled as follows:

Recommendations for employment submitted in support of candidates applying for employment by the commonwealth, or any political subdivision of the commonwealth, shall not be considered by a hiring authority until the applicant has met all other qualifications and requirements for the position to be filled; provided, however, that a hiring authority may, in accordance with said agency's regular practice for conducting reference checks, contact and speak with a reference provided to it by a candidate for employment, or contact and speak with any person who has submitted a written recommendation on behalf of a candidate for employment with said agency.<sup>10</sup>

A public employee who knowingly gives an employment applicant preferential treatment in violation of G.L. c. 66, § 3A by, for example, putting an applicant on the list of "finalists" based on an employment recommendation, even though the candidate has not met all the other qualifications for the position, violates § 23(b)(2) of the conflict of interest law, because the public employee has given the applicant an unwarranted privilege of substantial value.<sup>11</sup>

Furthermore, as explained above, public employees may not knowingly participate in any hiring process in which an immediate family member seeks employment. This means that an appointed public employee whose immediate family

member is an applicant for a job in the public employee's agency may not review resumes to select applicants to interview, participate in the interview process, participate in choosing the finalists or the successful candidate, or participate in the hiring process in any other way (the only exception to this prohibition is if the appointed public employee fully discloses the facts in advance to his or her appointing authority and obtains the appointing authority's advance, written permission to participate, pursuant to §§ 6, 13, or 19 of the conflict of interest law). Moreover, to comply with the law, it is not sufficient merely to refrain from reviewing the immediate family member's resume or conducting her interview; the public employee must stay out of the hiring process altogether, and must not take any actions concerning other, competing applicants for the position.

Finally, participating in a hiring process by knowingly acting on a recommendation, or in any other manner, when a personal friend, relative who is not an immediate family member, business associate, or someone else with whom the public employee has a comparable private relationship, is one of the applicants, will raise an appearance of a conflict of interest under § 23(b)(3) of the conflict of interest law. A public employee may satisfy § 23(b)(3) of the conflict of interest law by filing a written disclosure before participating in a hiring process that involves a personal friend, business associate, non-immediate family member, or person with whom he has a comparable private relationship, as long as he is able to act fairly and objectively in performing his public duties.

#### V. *Some Employers May Not Receive Recommendations from Public Employees*

In addition to the conflict of interest law restrictions discussed above, a separate statute provides that some employers are "off-limits" for employment recommendations by public employees. Most public employees are expressly prohibited from recommending anyone for employment by any public service corporation, specifically including any "railroad, street railway, electric light, gas, telegraph, telephone, water or steamboat company,"<sup>12</sup> or any "licensee conducting a horse or dog racing meeting" pursuant to G.L. c. 128A, § 40. A recommendation knowingly made in violation of G.L. c. 271, § 40, or any other statute, gives the person recommended an unwarranted privilege of substantial value, in violation of § 23(b)(2).

#### VI. *Public Agencies and Elected Bodies May Adopt Their Own More Stringent Standards*

This Advisory sets forth the restrictions imposed by the conflict of interest law, G.L. c. 268A, on public employees' recommendations for employment. Public agencies and elected bodies may also adopt their own more stringent standards regarding such recommendations. G.L. c. 268A, § 23(e).

This Advisory is intended to assist public employees understand how the conflict of interest law applies to recommendations for employment. This Advisory is not a



substitute for legal advice specific to your particular situation, nor does it mention every aspect of the law that may apply in a particular situation. Public employees can obtain free, confidential advice about the conflict of interest law from the Commission's Legal Division by submitting an electronic request on our website, [www.mass.gov/ethics](http://www.mass.gov/ethics). Public employees may also call the Commission at (617) 371-9500 and ask to speak to the Attorney of the Day or submit a written request for advice to the Commission at One Ashburton Place, Room 619, Boston, MA 02108, Attn: Legal Division.

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<sup>1</sup> "Substantial value" is defined as \$50 or more, 930 CMR 5.05. Paid employment, or unpaid employment with benefits, is of substantial value. In addition, unpaid employment without benefits may be of substantial value because of the value of the work experience gained.

<sup>2</sup> *EC-COI-95-5; EC-COI-91-13; EC-COI-87-37.*

<sup>3</sup> "Immediate family" is one's parents, siblings, spouse, and children, and the parents, siblings, and children of one's spouse. G.L. c. 268A, §1(e).

<sup>4</sup> G.L. c. 268A, §§ 6, 13, 19.

<sup>5</sup> *EC-COI-93-11; In Re Craven*, 1980 SEC 17, *aff'd* 390 Mass. 191 (1983).

<sup>6</sup> The conflict of interest law does not prohibit private recommendations of immediate family members, that is, recommendations made without the use of official title, official letterhead, or any other public resources, because a private recommendation does not involve any use of official position.

<sup>7</sup> Because campaign contributions are required to be disclosed pursuant to G.L. c. 55, an elected public employee who recommends a campaign contributor is not required to make an additional disclosure pursuant to § 23(b)(3), but may not give selective preferential treatment to the contributor. 930 CMR 5.10.

<sup>8</sup> *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), *aff'g In Re Craven*, 1980 SEC 17; *In Re Travis*, 2001 SEC 1014.

<sup>9</sup> *In Re Piatelli*, 2010 SEC 2296, 2301-2 (telephone calls); *In Re Manning*, 2007 SEC 2076 (conversation); *In Re Murphy*, 2001 SEC 1003 (conversation); *In Re Singleton*, 1990 SEC 476, 477 (conversation); *In Re Cibley*, 1989 SEC 422 (telephone call).

<sup>10</sup> Additional requirements apply to the hiring processes of the Trial Court and Probation, G.L. c. 211, § 10D, c. 211B, § 10D, c. 276, § 83. Also, all applicants for state employment are now required to disclose, in writing, "the names of any state employee who is related to the [applicant] as: spouse, parent, child or sibling or the spouse of the [applicant's] parent, child or sibling." G.L. c. 268A, § 6B.

<sup>11</sup> Giving something to someone in violation of a statute amounts to giving an "unwarranted privilege" for purposes of § 23(b)(2). *Advisory 11-1; EC-COI-98-2.*

<sup>12</sup> An entity is a "public service corporation" if it is "organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business;" subject to the requisite degree of governmental control and regulation; and it provides a public benefit. *Planning Board of Braintree v. Department of Public Utilities*, 420 Mass. 22, 26 (1995). The term is not limited to corporations, but may include municipal electric departments and other public utilities, and entities that provide public transportation. *Id.*