

LEGAL OPINION FROM LAUREN GOLDBERG, ESQ., KOPELMAN & PAIGE
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DUKES COUNTY CHARTER STUDY COMMISSION

You have forwarded several e-mails with questions relative to adoption of one of the plan forms of County government set forth in G.L. c.34A. I have set forth each of your questions, in bold, below, and then provided an answer thereto.

1. Would it be possible for us to recommend to the voters that County Commissioners have terms of three years, or are our only options a two year, or four-year, term?

In my opinion, assuming that the Charter Commission wishes to recommend one of the plan forms of government, the Commission may not recommend three-year terms for County Commissioners. As we have previously discussed, pursuant to state statute, the County Commissioners are elected on the state election ballot. Such elections are held every other year. As a result, in my opinion, under such circumstances the Charter Commission is limited to a recommendation that Commissioners be elected for two or four-year terms.

In my further opinion, however, if the Charter Commission is considering proposing a special act charter, the Commission may recommend a different process for electing County Commissioners, including three-year terms for County Commissioners. Be reminded, however, that if Commissioners were to be elected for three-year terms, they could not be elected on the state election ballot, and therefore the Charter Commission would need to address in the special act the process for election of the County Commissioners. For example, the following questions come to mind. Would the County Commissioners be elected at Town elections occurring on different days? Would there be a separate special election for County Commissioners in all towns on the same day? Who would bear the costs of such an election? Who would issue nomination papers and where would they be filed? Who would call for the election?

2. Under the Board Chairperson form of County Commission, can the Board Chair make appointments, as well as removals of appointees, if the other DCC members don't "consent"?

In my opinion, the Board Chairperson needs the advice and consent of the County Commissioners to make certain appointments, but may remove such appointees without approval from the rest of the County Commissioners. General Laws c.34A, §19(B)(v)(b) provides that the Board Chairperson shall, "With the advice and consent of the board, appoint all members of boards, and commissions and authorities, and all other officials not serving in the administrative service of the county the manner of whose appointment is not prescribed elsewhere in this section." [emphasis supplied]. In contrast, G.L. c.34A, §19(B)(v)(e) provides that "At his discretion, [the board chairperson may]

remove or suspend anyone occupying one of the offices specified in subclause (b) of clause (v) of subsection (B) of this section.” Thus, in my opinion, G.L. c.34A, §19 provides that the Board Chairperson may make certain appointments only upon the advice and consent of the County Commissioners, but may remove such individuals at his discretion, i.e., without consent and approval of the rest of the County Commissioners.

3. Does the County Administrator, under the Board Chairperson form of government, report to the Board Chair, and only through him to the full Board? And does the County Administrator have roughly the same executive authority as the County Manager (under the County Manager form), or does s/he have only as much or as little authority as the Board Chair explicitly gives?

General Laws c.34A, §19(E)(iii) provides, as you have indicated, “The administrative officer shall be responsible to the board through the chairperson except as specified below.” This language, in my opinion, directs the County Administrator to interact with the Board Chairperson regarding daily activities, decisions, etc. However, please also note that G.L. c.34A, §19E(i) provides, “The county administrative officer shall serve at the pleasure of the board.” Thus, as a practical matter, in my opinion the County Administrator will need to ensure that all the County Commissioners are satisfied with his or her performance. Note as well that the County Administrator is required by statute to interact with the full Board of County Commissioners with regard to: the County budget; trends of county services, finances and programs of all boards, commissions, agencies and other county bodies; negotiation and presentation of contracts which will be subject to approval by the full Board of County Commissioners; and matters involving the nature and location of county improvements and executive improvements determined by the board.

With regard to the respective authority of the Board Chairperson, the Board of County Commissioners and the County Administrator, the Board Chairperson form of government divides responsibilities and authority as follows: Board of County Commissioners – legislative body, with certain additional authority such as advice and consent with regard to particular appointments, approval of contracts, and involvement in policy setting with regard to big picture issues; Board Chairperson – executive authority, including execution of contracts; County Administrator – administrative authority, including negotiation of contracts and supervision of personnel. Thus, the Board Chairperson and the County Manager share similar executive authority, but the County Administrator and the County Manager share similar administrative responsibilities.

4. This is a two-part question. The broad question is whether there are any restrictions of the County Commissioners in appointing one of their own members as a member of other Boards and Commissions, including the Airport Commission? What does the word "supervision" mean in Ch. 268A, Section 15A.?

General Laws c.268A, §15A provides, in part, “No member of a county commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board.” This section is substantially similar to those applicable to state and municipal boards and committees under G.L. c.268A, §§8A and 21A. In EC-COI-03-3, the State Ethics Commission indicated:

The Commission has explained in EC-COI-92-306 that sections like 8A, 15A, and 21A have their roots in the common law doctrine of incompatibility of offices. In *Gaw v. Ashley*, 195 Mass. 173 (1907), the Supreme Judicial Court first applied this doctrine to hold that a municipal board could not appoint its own member to a position under the board’s supervision. While the court seemed chiefly concerned that the appointee would continue to sit on the board, and thus that his present colleagues would be supervising his performance, the court phrased the prohibition more generally, as prohibiting the appointment itself. Soon after the court again applied this prohibition, in *Attorney General v. Henry*, 262 Mass. 127, 132 (1928), the Legislature enacted a narrow exception, allowing the town meeting to approve an otherwise prohibited appointment [footnote omitted]. St. 1929, c. 36, enacting G.L. c. 41, § 4A.7 The Commission also observed in EC-COI-92-30 that the Supreme Judicial Court later held that G.L. c. 41, § 4A otherwise codified the common-law rule; and that shortly after § 21A of G.L. c.268A was enacted in 1967, the court observed: “The legislative purpose behind the enactment of [§ 21A] seems to confirm the purpose which was contained in G.L. c. 41, § 4A.” In EC-COI-93-19 the Commission further observed as to the purpose of §§ 8A, 15A, and 21A: This incompatibility includes the potential danger that a board member will attempt to persuade his fellow colleagues to appoint him or otherwise engage in conduct which might give the appearance of such self-dealing activity, and the danger that, as a result of alliances formed through service together on a board, board members will be persuaded to reappoint one who, under different circumstances, they would conclude should be removed from office.

In my opinion, therefore, the prohibition of G.L. c.268A, §15A only applies to positions which are actually under the direct supervision of the County Commissioners. For example, in my opinion, under the County Manager form of County government, the County Commissioners would be prohibited from appointing a County Commissioner to the position of County Manager as the County Manager is directly answerable to the County Commissioners. Similarly, in my further opinion, under the Board Chairperson form of County government, the Board of County Commissioners would be prohibited from consenting to the appointment of a member of the Board to the position of County Administrator, as the County Administrator is under the direct supervision of the Board Chairperson (who is a member of the Board of County Commissioners) and, through the Chairperson, to the County Commissioners.

In contrast, where the Board of County Commissioners is the appointing authority for an entity which has its own statutory responsibilities, such as the MV Airport Commissioner, the provisions of G.L. c.268A, §15A are not implicated, in my opinion. Moreover, as you have indicated, Chapter 243 of the Acts of 1988 provides specific authority for a member of the County Commissioners to be appointed to and serve on the MV Airport Commission.

Finally, be advised that although it is possible that G.L. c.268A, §15A may not be an issue in any particular instance, other provisions of the Conflict of Interest Law could be implicated by appointment of a member of the County Commissioners to another position. As with any question under the Conflict of Interest Law, the particular facts at issue will dictate the result, and therefore each such situation must be analyzed on a case by case basis.

4. Does the MV Commission have authority to review/approve a building that the State might build on MV?

I have not yet had a chance to review the authority of the MV Commission with regard to review and approval of a building that that state might build.

5. IF the Charter Commission voted to recommend two year terms for future Dukes County Commissioners, and IF that was approved by the voters at the November 2008 election, would it be possible for there to be "a clean slate" immediately after that? Would it mean that already-elected County Commissioners would continue to serve out their terms? Would the next following general election (presumably in 2010) be the first time there could be new candidates running?

Established principles of election law provide that an elected official generally has the right to hold office until the expiration of his or her term. As a policy matter, neither the courts nor the legislature favors the forced removal of an elected public official prior to the expiration of the official's term. In analyzing whether elected officials in a municipality could be removed from office prior to the expiration of their terms, the court stated, in *Attorney General v. Stratton*, 194 Mass. 51, 53 (1907), "in the cities and towns of Massachusetts, there is no power to remove public officers except that which is given by the statutes." As an example of a statutory provision which authorizes removal, G.L. c.41, §21, provides that if a Town votes at an election to appoint certain officers, the terms of such officers will terminate upon appointment of such officers. See also, G.L. c.41, §1B (addressing the result for incumbents if certain offices are changed from elected to appointed). Further a special act of the General Court may eliminate a specific

position or an act creating a charter may make wholesale changes to an entity's form of government.

This analysis is equally applicable here, in my opinion. In this case, G.L. c.34A, §12 does not state that the terms of any current County Commissioner could be prematurely terminated by adoption of a charter which includes changes relative to the number or terms of service of County Commissioners. Accordingly, in my opinion, if the Charter Commission were to recommend a reduction in the number of County Commissioners or in the length of their terms of service, such a change would happen over time by attrition, rather than all at once.

6. Under the Board Chairperson form of county government, is it assumed that the Board Chair, as executive, would have to be the procurement officer? Could the Chair designate the County Administrative Officer as the procurement officer? Do we have to have a procurement officer separate from the Board Chair?

General Laws c.34A, §19(B)(iv)(g) provides that the Board Chairperson shall "Execute all contracts, bonds or other instruments requiring the consent of the county." While this places authority to execute contracts with the Board Chairperson, in my opinion it does not make the Board Chairperson the "Chief Procurement Officer."

You also ask whether the Board Chairperson could designate the County Administrator as the Chief Procurement Officer. Pursuant to G.L. c.30B, §2, the Chief Procurement Officer in a county with a county executive is appointed by the county executive. In this case, therefore, the Board Chairperson is by statute the County Executive. Note further, however, that G.L. c.34A, §19(E)(iii)(g) appears to suggest that the County Administrator will act as the Chief Procurement Officer, stating that the County Administrator shall, "negotiate contracts for the county with the approval of the county commissioners." In my opinion, therefore, if the Board Chairperson were to appoint someone else to serve as the Chief Procurement Officer, that person would need to work with the County Administrator to ensure compliance with the requirements of the County Charter. Please also be aware that a Chief Procurement Officer may delegate such responsibility pursuant to the provisions of G.L. c.30B, §19, as follows:

A delegation shall be in writing, be signed by the chief procurement officer, and state the activity or function authorized and the duration of the delegation. A delegation may be in specific or general terms, may be limited to a particular procurement or class of procurements, and may be conditioned upon compliance with specified procedures. A delegation may be revoked or amended whenever the chief procurement officer determines that revocation or amendment is in the best interests of the governmental

body. A delegation of powers or duties by a chief procurement officer and any revocation or amendment thereof shall not take effect until a copy of the same has been filed with the office of the inspector general.

Please contact me with any further questions.

Very truly yours,

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