



# Commonwealth of Massachusetts STATE ETHICS COMMISSION

One Ashburton Place - Room 619  
Boston, Massachusetts 02108

Hon. Barbara A. Dortch-Okara (ret.)  
Chair

Karen L. Nober  
Executive Director

November 30, 2015

James Wettlaufer  
Michael Kennedy  
Christian Petersen  
c/o Thomas Kiley, Esq.  
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One International Place, Suite 1820  
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Brian Johnson  
c/o Linda J. Thompson, Esq.  
Thompson & Thompson, P.C.  
1331 Main Street  
Springfield, MA 01103

Lynn Arnold  
c/o Thomas Kenefick, Esq.  
73 Chestnut Street  
Springfield, MA 01103

Re: Public Education Letter: Public Resources; Private Litigation

Dear Ms. Arnold and Mssrs. Wettlaufer, Kennedy, Petersen and Johnson:

As you know, the State Ethics Commission conducted a preliminary inquiry into allegations that each of you violated the conflict of interest law, G.L. c. 268A. The preliminary inquiry focused on allegations that from 2011 through 2013, Town of Holland Selectmen Arnold, Wettlaufer, Kennedy and Petersen authorized the expenditure of Town funds to pay Special Town Counsel Tani Sapirstein \$23,023 to represent Town Highway Surveyor Brian Johnson in a private civil lawsuit against local blogger Peter Frei. The Commission also considered whether Highway Surveyor Johnson's solicitation and receipt of Town funds to pay for his private lawsuit were because of his official position, and therefore in violation of the conflict of interest law.

On March 19, 2015, the Commission voted to find reasonable cause to believe that each of you violated G.L. c. 268A. You sought reconsideration and submitted memoranda to the Commission. Thereafter, the Commission affirmed its reasonable cause determination. Rather than authorizing adjudicatory proceedings against you, however, the Commission chose to resolve this matter through this Public Education Letter because the Town has been reimbursed in full and there is a question as to whether you relied on advice of counsel.

In addition, other public employees will benefit from a public discussion of the facts revealed by the preliminary inquiry, and an explanation of how the Commission will apply Chapter 268A to the facts. Specifically, the conflict of interest law is intended to prevent conflicts between private interests and public duties, and therefore the law does not allow public resources, such as town funds, to be used for private purposes. Notwithstanding the arguments you advance to the contrary, whether the public employee sincerely believes such use promotes the greater good is irrelevant. It is a violation of the conflict of interest law, and a misuse of one's public position, to use public resources to fund a private lawsuit to deter future lawsuits and to solicit or receive such funding because of one's position.<sup>1</sup>

The Commission and you have agreed that there will be no formal proceedings against you in this matter, and you have each chosen not to exercise your right to a hearing before the Commission. Selectmen Arnold, Wettlaufer, Kennedy and Petersen have voluntarily reimbursed the Town for the legal fees paid to Special Town Counsel Sapirstein from their personal funds, in the total amount of \$23,023.

## **I. Facts**

Peter Frei is a Town of Holland resident who operates *The Holland Blog 01521.com*. Frei regularly publishes articles on his blog that are critical of Town of Holland officials generally, and of Highway Surveyor Brian Johnson and his family, in particular. Significant animosity exists between Frei and Johnson, which began several years ago over a zoning dispute. Johnson's father, Earl Johnson, was a member of the Planning Board at the time. The longstanding feud between Frei and Johnson's family is well known in the Holland community. Frei has also filed a number of lawsuits against the Town and its employees in their individual capacities, and has appealed various Town administrative decisions.

On February 19, 2011, a local club sponsored an ice-fishing derby on Holland's Lake Hamilton. Highway Surveyor Johnson and his friends participated in the derby. Johnson was on his own time, drinking alcohol and barbecuing with friends. Frei's home is located on the lake. An altercation between Frei and Johnson ensued, which Frei secretly audio-recorded.

Highway Surveyor Johnson asked Selectman Wettlaufer, then Chairman of the BOS, what the Town could do to prevent Frei from "harassing" him. Johnson believed he had a viable claim against Frei for secretly recording him. Selectman Wettlaufer said that he would bring the matter to the other BOS members. Shortly thereafter, Wettlaufer told Johnson that the Town would pay Johnson's legal fees to pursue his civil action against Frei, concluding that Frei would not have harassed Johnson but for his status as a public official, and that such an action could discourage Frei from continuing litigation against the Town and its officials.

On June 9, 2011, Johnson filed a civil complaint in Palmer District Court against Frei for illegal wiretapping based on Frei's recording of the confrontation during the ice-fishing

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<sup>1</sup> While the Commission has decided to resolve this matter by way of a Public Education Letter, rather than through an adjudicatory process, the Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$10,000 for each violation.

incident.<sup>2</sup> Special Town Counsel Sapirstein represented Johnson in his private civil lawsuit. Frei counterclaimed against Johnson alleging assault, assault and battery, defamation, libel and slander, intentional and negligent infliction of emotional distress, abuse of process, obstruction of justice and civil rights violations. Following a 2 ½ day jury trial, on February 26, 2013, the jury awarded Johnson \$100 on his claim that Frei had illegally recorded him in violation of the state wiretapping statute. The Court awarded Johnson \$8,455 in attorney's fees plus \$95.21 in costs. The jury awarded Frei \$1,500 on his civil rights claim and \$100 on his defamation claim against Johnson. The Court awarded Frei \$16,024.65 in attorney's fees plus \$1,522.01 in costs. These cases, and the attorney's fee awards, are currently on appeal.

At different times during the period of 2011 through 2013, Selectmen Arnold,<sup>3</sup> Wettlaufer, Kennedy and Petersen authorized the Town to pay Special Town Counsel Sapirstein for her representation of Highway Surveyor Johnson in his private civil lawsuit against Frei, acting on their belief that Frei had secretly recorded the ice derby encounter because of Johnson's status as a public official. The Selectmen also funded Johnson's private lawsuit against Frei because they hoped that the lawsuit would deter Frei from filing future lawsuits against the Town and its employees. The Selectmen authorized payment of \$23,023 in legal fees to Special Town Counsel Sapirstein to represent Johnson in his private civil lawsuit.

## **II. Legal Discussion**

### **Selectmen Arnold, Wettlaufer, Kennedy and Petersen**

Section 23(b)(2)(ii) of the conflict of interest law prohibits a municipal employee from knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value, which are not properly available to similarly situated individuals. Interpreting that language, the Ethics Commission has stated that a privilege is "unwarranted" when it is "lacking adequate or official support," or has "no justification" or is "groundless." *EC-COI-98-2*.

Selectmen Arnold, Wettlaufer, Kennedy and Petersen violated G.L. c. 268A, § 23(b)(2)(ii) by authorizing the use of Town funds to pay for Highway Surveyor Johnson's private civil lawsuit against Frei because there was no legal basis for that authorization.

Selectmen Arnold, Wettlaufer, Kennedy and Petersen are "municipal employees," as defined by G.L. c. 268A, § 1(g), because they each hold elected office in a municipal agency.

The payment of Johnson's legal fees was a privilege. The privilege was unwarranted because there was no legal justification for using public funds to pay for a private civil lawsuit. Moreover, the Commission does not accept that the aim of deterring future lawsuits against the

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<sup>2</sup> Brian Johnson v. Peter Frei, Palmer District Court, Civil Action No. 1143CR293.

<sup>3</sup> Selectman Arnold was elected to the BOS in 2012, a year after the BOS first authorized the Town to pay Special Town Counsel Sapirstein for her representation of Highway Surveyor Johnson in his private civil lawsuit against Frei. From her election in 2012 through 2013, Selectman Arnold approved payments to Special Town Counsel Sapirstein for Johnson's legal fees.

Town is a legitimate justification for this expenditure of Town funds.

The privilege, the payment of legal fees by the Town, was of substantial value because the fees totaled \$23,023. Selectmen Arnold, Wettlaufer, Kennedy and Petersen knowingly used their positions to authorize the use of Town funds to pay Johnson's legal fees in Johnson v. Frei, a private civil action. Other public employees who have disputes with local residents do not have the public coffers at their disposal to fund their private lawsuits. Therefore, the privilege secured for Johnson by the Selectmen was not available to similarly situated individuals.

### **Highway Surveyor Brian Johnson**

Section 23(b)(2)(i) prohibits a municipal employee from knowingly, or with reason to know, soliciting or receiving anything of substantial value for himself, which is not otherwise authorized by statute or regulation, for or because of his official position. Highway Surveyor Johnson violated G.L. c. 268A, § 23(b)(2)(i) by receiving payment of the legal fees in his private civil lawsuit for or because of his official position.

As the elected Highway Surveyor, Johnson is a "municipal employee," as defined by G.L. c. 268A, § 1(g), because he holds an elected office in a municipal agency.

Johnson received payment of his legal fees in his private civil action against Frei as authorized by the Selectmen. Payment for the legal services Johnson received was of substantial value because the cost of those services totaled \$23,023.

Payment of Johnson's legal fees was not authorized by statute or regulation. Johnson was the plaintiff in a private civil lawsuit against Frei, which arose out of a confrontation that occurred while Johnson was off duty on personal time. There was a purely private dispute steeped in mutual, longstanding antipathy. There was no legitimate public purpose for the Town to fund Johnson's lawsuit against Frei for secretly recording Johnson. The incident did not relate to Johnson's duties as Town Highway Surveyor, and his role in the incident was entirely that of a private party.

### **III. Disposition**

Citizens have the right to petition the courts and bring legal actions against Town officials. It is for the courts to determine whether those lawsuits are meritorious. While Town resources may be used to defend public employees in connection with actions taken in their capacities as public officials, Town resources may not be used to fund private lawsuits in an effort to interfere with the exercise of citizens' rights.

Very truly yours,



Karen L. Nober  
Executive Director