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September 13, 2019

Carol G. Cormier, MHA, LIA
Senior Client Executive
Gallagher Benefits Services
11 Midstate Drive, Suite 200
Auburn, MA 01501

Re: CCMHG Request for Legal Opinion

Dear Carol:

Issue/Summary of Opinion

On behalf of the Cape Cod Municipal Health Group (“CCMHG”), you have asked for a legal opinion about whether a representative to the CCMHG for a Participating Governmental Unit (“PGU Representative”) who subscribes to a CCMHG health insurance plan violates Massachusetts’ Conflict of Interest Law (M.G.L. c. 268A) by participating in deliberations/votes that affect the costs of CCMHG health insurance plans without disclosing the “conflict” and obtaining the approval of the Representative’s appointing authority to participate.

For the reasons stated below, we advise any PGU Representative to the CCMHG who subscribes to a CCMHG health insurance plan not to deliberate or vote on matters that affect the costs of CCMHG health insurance plans until they obtain the exemption under section 19(b)(1) of c. 268A.

Background

M.G.L. c. 32B, § 12 authorizes municipal entities to form Health Insurance Joint Purchase Groups for the negotiation and purchase of health insurance, with the goal being to lower health

insurance costs for the Participating Governmental Units. Generally, these groups operate under the provisions of a Joint Purchase Agreement ("JPA") which requires each PGU to appoint a primary and back-up representative to a Board which administers the JPA. It is our understanding that most of the PGU Representatives to the CCMHG subscribe to health insurance offered by the CCMHG.

The issue addressed by this letter arose when a PGU Representative to the CCMHG, who we will refer to as "PGU Representative A," was accused by someone from PGU Representative A's community of having a conflict of interest. Although no complaint was filed with the Ethics Commission, the PGU Representative A reached out to the Ethics Commission's Legal Division for advice regarding whether PGU Representative A's participation created a conflict of interest. Like all other PGU Representatives to the CCMHG, PGU Representative A participates in deliberations and votes on what health insurance plans the CCMHG will offer to PGUs, including the premium cost, changes in plan design, etc. As discussed further below, the Ethics Commission advised PGU Representative A that the Representative must abstain from participating in deliberations and votes related to the cost of the CCMHG health insurance plans unless the Representative obtains an exemption under section 19(b)(1).

There has never been any suggestion that any actions, votes, etc. by PGU Representative A, or any other PGU Representative to the CCMHG, was motivated by personal financial interests. Rather, this comes down to the definition of "financial interest" in c. 268A. Although the position of the Ethics Commission is directed at PGU Representative A, its position raises the question about whether a similarly situated PGU Representative to the CCMHG---or, for that matter, similarly situated PGU Representatives to other Massachusetts Health Insurance Joint Purchase Groups under M.G.L. c. 32B, § 12---are violating c. 268A unless they follow the exemption process available under M.G.L. c. 268A, § 19.

Pertinent Provisions of M.G.L. c. 268A

M.G.L. c. 268A, § 19 reads as follows:

Section 19. (a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than \$10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

(b) It shall not be a violation of this section:

(1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so

substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee, or

(2) if, in the case of an elected municipal official making demand bank deposits of municipal funds, said official first files with the clerk of the city or town, a statement making full disclosure of such financial interest, or

(3) if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

The Ethics Commission's online Summary of the Conflict of Interest Law for Municipal Employees states the following about section 19:

- A municipal employee may not participate in any particular matter in which he or a member of his immediate family (parents, children, siblings, spouse, and spouse's parents, children, and siblings) has a financial interest. He also may not participate in any particular matter in which a prospective employer, or a business organization of which he is a director, officer, trustee, or employee has a financial interest. Participation includes discussing as well as voting on a matter, and delegating a matter to someone else.
- A financial interest may create a conflict of interest whether it is large or small, and positive or negative. In other words, it does not matter if a lot of money is involved or only a little. It also does not matter if you are putting money into your pocket or taking it out. If you, your immediate family, your business, or your employer have or has a financial interest in a matter, you may not participate. The financial interest must be direct and immediate or reasonably foreseeable to create a conflict. Financial interests which are remote, speculative or not sufficiently identifiable do not create conflicts.

"Participation" includes giving advice and making recommendations, as well as deciding and voting on particular matters. M.G.L. c. 268A § 1(j). According to Ethics Commission decisions, financial interest may be of any size and may be either positive or negative. EC-COI-84-96. Further, the financial interest only need be "reasonably foreseeable" in order to be covered by § 19. EC-COI-86-25; 84-123; 84-98; 84-96.

Ethics Commission Position with Respect to PGU Representative A

With the permission of PGU Representative A, we spoke with the Ethics Commission Attorney who advised Representative A. That attorney advised that, as defined under § 19 of M.G.L. c. 268A, the Representative has a "financial interest" in the costs associated with the health insurance plans. The Ethics Commission Attorney also advised that the Representative was eligible to seek a § 19 exemption that would allow continued participation. The process involves filing a disclosure form with the Representative's Appointing Authority and obtaining from that

Appointing Authority a written determination that the financial interest is not so substantial as to be likely to affect the integrity of the Representative's services as the PGU's Representative to the CCMHG.

As the Ethics Commission sees it, a PGU Representative to the CCMHG who participates in deliberations and/or votes related to the costs of CCMHG health insurance plans is "participating" in a "particular matter" for the purposes of section 19. But the critical issue is whether a PGU Representative, by deliberating and voting on matters that affect the cost of CCMHG health insurance plans while subscribing to a CCMHG health insurance plan, has a financial interest that is "reasonably foreseeable."

A PGU Representative who participates in discussions and votes that affect the terms and costs of the health insurance plans offered by the CCMHG is supposed to be representing the broader interests of the PGU and its health insurance subscribers, and we fully expect that is what these representatives do. While the Ethics Commission does not dispute this in the case of PGU Representative A, it points to the broad definition of "financial interest" under M.G.L. c. 268A as the basis for its position that the Representative also has a personal financial interest that is "reasonably foreseeable"---an objective standard that is not based on how the Representative acted or voted in any particular matter.

For this reason, the Ethics Commission advised PGU Representative A that the Representative must abstain from participating in deliberations and votes related to the cost of the CCMHG health insurance plans unless the Representative obtains an exemption under section 19(b)(1), which provides:

b) It shall not be a violation of this section

(1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee,

The disclosure form used to obtain this exemption is enclosed.

Notwithstanding that there are similarly situated PGU Representatives to the CCMHG, as well as to other Health Insurance Joint Purchase Groups in Massachusetts, this is the first time that we know of that this type of c. 268A issue has been raised with respect to a PGU Representative to a Health Insurance Joint Purchase Group in Massachusetts. The Ethics Commission Attorney could not point us to any prior decision of the Ethics Commission that addressed the issue in this context.

No Regulatory Exemptions, Opinions or Cases to Challenge the Ethics Commission Position

We note that the Courts give the Ethics Commission deference in its interpretation/application of c. 268A to particular circumstances. We may differ with the Commission's application of section 19 to PGU Representative A and/or other PGU Representatives, but our research has not revealed a regulatory exemption, opinion or case upon which to challenge the Commission's view.

We informed the Massachusetts Municipal Association ("MMA") of the Ethics Commission's position with respect to PGU Representative A, including to point out the negative impact it could have on the administration of the CCMHG and other Health Insurance Joint Purchase Groups in Massachusetts and to seek assistance before the Ethics Commission on behalf of such Groups. However, the MMA indicated that, several years ago, it was involved in a matter involving a municipal official who subscribed to the municipal health insurance while making cost decisions about the health insurance plans that would be offered. This official was advised by the Ethics Commission that the official was in violation of section 19 unless the official sought and obtained the exemption under section 19(b)(1). Ultimately, the MMA advised the official to comply. The MMA's response in this matter is essentially the same. Therefore, it appears that persuading the Ethics Commission to adopt a regulatory exemption and/or the Legislature to amend c. 268A are the only routes available to change the section 19 requirement for PGU Representatives to Health Insurance Joint Purchase Groups.

Conclusion

As we understand it, all, or almost all, of the PGU Representatives to the CCMHG fit the definition of "municipal employee" under M.G.L. c. 268A. Section 19, in pertinent part, prohibits a municipal employee from participating as such an employee in any particular matter in which (to his or her knowledge) he or she has a personal financial interest unless the employee first receives an exemption. "Participation" includes giving advice and making recommendations, as well as deciding and voting on particular matters. M.G.L. c. 268A, § 1(j). According to the Ethics Commission decisions, financial interest may be of any size and may be either positive or negative. EC-COI-84-96. Further, the financial interest only need be "reasonably foreseeable" in order to implicate section 19. EC-COI-86-25; 84-123; 84-98; 84-96. In this instance, the cost of health insurance plans constitutes a financial interest for a PGU Representative who subscribes to a CCMHG health insurance plan.

However, a PGU Representative so situated will not violate c. 268A if the PGU Representative:

... first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. (M.G.L. c. 268Am, § 19 (b) (1).

For the above reasons, it is our opinion that PGU Representatives who subscribe to CCMHG health insurance plans can only be involved in deliberations and votes that affect the costs of health insurance plans if they file a disclosure and get the determination from their Appointing Authority that it is acceptable for them to do so.

We have enclosed a sample disclosure form as well as a partially completed form that shows how it should be completed to seek the exemption. If you have any further questions or concerns about this matter, please contact me or Attorney Antoine Fares.

Sincerely,

A handwritten signature in black ink, appearing to read "Leo J. Peloquin", written in a cursive style.

Leo J. Peloquin

LJP/tmc

Enclosures

cc: Antoine Fares, Esq.