

MONAGHAN LEAHY, LLP

ATTORNEYS AT LAW

THOMAS G. LEAHY
KEVIN G. LIBBY
CHRISTOPHER C. DINAN
JOHN J. WALL, III
KENNETH D. PIERCE
CORNELIA S. FUCHS
ZACHARY I. GREENFIELD
ERICA M. JOHANSON
PATRICK D. THORNTON

THOMAS F. MONAGHAN
OF COUNSEL

95 EXCHANGE STREET
P.O. BOX 7046
PORTLAND, MAINE
04112-7046

TEL 207-774-3906
FAX 207-774-3833
tleahy@monaghanleahy.com

November 10, 2011

David S. Sherman, Jr., Chair
Town Council
Town of Cape Elizabeth
P.O. Box 6260
320 Ocean House Town
Cape Elizabeth, ME 04107

Re: Query Concerning Conflict of Interest

Dear David:

I understand that the Council would like additional comment from us concerning the scope of the Town Charter provision pertaining to conflict of interest. Specifically, I understand that it has been brought to the Council's attention that the school department apparently refers to teachers who substitute fewer than 14 days a year as "per diem" rather than "part-time." The question is whether the "per diem" appellation removes that position from the Charter's prohibition.

It is our opinion that the terminology employed to denominate an employment position is less significant than the remuneration for services rendered. As my initial letter indicated, Maine has long espoused a common law rule that seeks to insulate municipal officials from temptations prompted by personal interests that are incompatible with their elected offices. Building on case law from the turn of the century, the Law Court stated in 1931 that a conflict of interest arises when "the town officer by reason of his interest is placed 'in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official.'" *Tuscan v. Smith*, 130 Me. 36, 46 (1931) "Personal interests" arise out of employment in several ways, but most notably out of the financial benefit derived from employment. *See, e.g.*, 30-A M.R.S.A. § 2606 (prohibiting municipal officers from being appointed to a municipal employment position which was created or received a compensation increase during the officer's term of office and for one year thereafter); *see also* 30-A M.R.S.A. § 2605(4) (requiring disclosure by municipal officials of pecuniary interests in matters before them). Therefore, the common law supports a blanket prohibition against Town employment like the one adopted in the Charter.

David S. Sherman, Jr., Chair
Town Council
Town of Cape Elizabeth
November 10, 2011
Page 2

To the extent “per diem” substitute teachers are paid for their services, it is our opinion that the Charter prohibits such employment by municipal officers. We do not view the term “part-time” to identify only those positions that are tagged with that specific name. Rather, we believe the term should be read in a plain and ordinary manner to differentiate types of employment other than “full-time” employment. In our view, that understanding of “part-time” would encompass “per diem” substitute teachers.

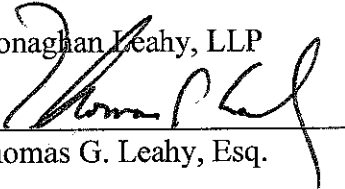
Finally, while it may be true that volunteer members of the fire department are treated differently, any such different treatment is based on the plain language of the Charter. Therefore, it represents a policy decision by the Town in adopting the Charter to treat those workers under a distinct rule.

Please let me know if we can provide you with any further assistance with regard to this issue.

Best regards,

Monaghan Leahy, LLP

By:


Thomas G. Leahy, Esq.