



A. JOSEPH DeNUCCI  
AUDITOR

# The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

DIVISION OF LOCAL MANDATES

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January 20, 2010

Charles T. Blanchard, Town Administrator  
Town of Paxton  
697 Pleasant Street  
Paxton, Massachusetts 01612

**RE: Chapter 28 of the Acts of 2009 – An Act to Improve the Laws Relating to  
Campaign Finance, Ethics, and Lobbying**

Dear Mr. Blanchard:

This letter is in response to your request on behalf of the Town of Paxton relative to the Local Mandate Law, G. L. c. 29, s. 27C, and the so-called Ethics Reform Act, cited above. As you know, a number of other communities have raised similar issues at the Division of Local Mandates (DLM). In particular, you and the other petitioners express concern that the training and administrative requirements in section 84 of the Act impose costs upon your communities contrary to the standards of the Local Mandate Law.

During the course of this review, you and other municipal managers provided compelling testimony to the inherent difficulties and confusion in implementation of what all would agree is important, necessary, and well-intended legislation. Nonetheless, in the final analysis, it is the opinion of DLM that the requirements of the Ethics Reform Act are not unfunded state mandates within the meaning of G. L. c. 29, s. 27C. The following discussion further explains this conclusion. Enclosed you will also find a copy of the letter the Office of the State Auditor has sent to the State Ethics Commission, asking that they join this office in crafting solutions to ease compliance at the local level.

**Background**

Among other things, section 84 of the Ethics Reform Act requires that all public employees complete an online training program every 2 years and file a certificate of completion with their employer. Additionally, public employers must distribute summaries of the Ethics Law annually to all employees, and keep on file certain acknowledgments and certifications for a 6-year period. Finally, each city and town must appoint a senior level employee to serve as a liaison to the State Ethics Commission.

Relevant to these requirements, the Local Mandate Law provides that any post-1980 law imposing additional costs upon any city or town must either be fully funded by the Commonwealth, or subject to local acceptance. In *City of Worcester v. the Governor*, 416 Mass. 751 (1994), the Supreme Judicial Court further defined the elements of an “unfunded state mandate.” Clearly, the law must take effect on or after January 1, 1981. Additionally, it must effect a genuine change in law, and be more than a clarification of existing obligations. It must also result in direct service or cost obligations that are imposed upon the municipality by the Commonwealth, not voluntarily undertaken at the local level. Finally, it must impose more than “incidental local administration expenses,” as these are explicitly exempted from the Local Mandate Law. *Worcester* at 754 – 755. Below we apply these standards first to the employee training requirements, then to the administrative requirements of the Act.

### **I. The Employee Training Requirement**

The relevant text of the Ethics Reform Act provides:

Every state, county, and municipal employee shall, within 30 days after becoming such an employee, and every 2 years thereafter, complete the online training program. Upon completion of the online training program, the employee shall provide notice of such completion to be retained for 6 years by the appropriate employer. G. L. c. 268A , s. 28, added by St. 2009, c. 28, s. 84.

#### **Mandate on the Employee, Not the City or Town**

By explicit terms, the Local Mandate Law applies to any post 1980 law that imposes a “...direct service or cost obligation *upon any city or town*...” G. L. c. 29, s. 27C(a), emphasis added. As cited above, the Ethics Reform Act states that “Every...employee shall...complete the online training program.” This language directly places the training obligation upon the employee, and requires the employer to do no more than maintain records.

By way of illustration, note that court authority has established that the Commonwealth is not obligated to fund state mandates, but instead, that communities may be freed from the obligation to comply by court order. (See the *Worcester* case, cited above.) In reviewing the text of the training requirement, it directly regulates the actions of individual employees by ensuring that they take affirmative steps to obtain some verifiable exposure to the long-standing standards of behavior defined in the body of ethics law. In the context of the training requirement, there appears to be nothing from which a court could exempt a city or town.

### **Collective Bargaining Considerations**

It has been noted by petitioners that many employee collective bargaining agreements place certain responsibilities for new training requirements on the municipal employer, and in some cases, require that new training be provided outside of the normal work day. In these cases, municipal employers may incur the cost of providing overtime pay to employees. Nonetheless, this cost obligation is not a direct and necessary result of the Ethics Reform Act. Rather, it stems independently from the particular collective bargaining agreement in effect in a given community, which by definition, is an arms length contract of terms negotiated and ratified by the municipality and the employee bargaining group.<sup>1</sup> Costs incurred as a result of collective bargaining agreements are not costs imposed upon a community *by the Commonwealth*. For these reasons, it is the opinion of DLM that G. L. c. 29, s. 27C does not apply to the employee training element of the Ethics Reform Act.

### **Not a “New Law Changing Existing Law”**

There is an additional point from the *Worcester* case that must be considered. It is possible that the courts may not view the elements of the Ethics Reform Act at issue as “new law changing existing law,” but rather, as a clarification, or providing the details to achieve obligations imposed by prior law. In *Worcester*, the Court reviewed an amendment to Department of Education regulations providing that children of preschool age with substantial disabilities are entitled to special education services. The amendment defined “substantial disability” in such a way that the Worcester school department began serving youngsters they would not have served under the prior language. DLM concluded that the Local Mandate Law applied to the amendment, and certified the compliance costs to the City in excess of \$90,000. While recognizing that the amendment was a post-1980 change in language, the Court disagreed with DLM, reasoning that the amendment was not a substantive new requirement. In the Court’s view, the defined level of service had been required by the language in effect before the amendment (and before 1981), and the amendment only clarified that requirement. Similarly, the training requirement specified by the Ethics Reform Act may be viewed as a clarification of what was reasonably required before the 2009 amendments. That is, the duty of public employees to conform to statutory standards of ethical conduct (dating back to at least 1962) might encompass the duty to obtain appropriate training in those standards – “...a common sense corrective of a difficulty inherent in the practical operation of that section.” *Broderick v. Mayor of Boston*, 375 Mass. 98, 103 (1978) (Subsequent amendment to a local option law did not require fresh acceptance.)

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<sup>1</sup> It has also been suggested that the Collective Bargaining Law, G. L. c. 150E, is an unfunded state mandate. Without assent, we note that even if it were, it would be a pre-1981 mandate, outside of the scope of G. L. c. 29, s. 27C. See St. 1973, c. 1078, adding Chapter 150E to the General Laws.

## **II. The Record-Keeping, Distribution of Summaries, and Liaison Requirements**

As noted above, the Ethics Reform Act requires that public employers retain for 6 years a “notice of completion” from each employee that completes the training requirement. It also requires that municipal clerks provide an Ethics Law summary prepared by the State Ethics Commission to each local employee each year, and that employees file a signed acknowledgement of receipt of the summary with their local clerks. Additionally, each city and town must designate an employee to serve as its liaison to the State Ethics Commission. G. L. c. 268A, ss. 27, 28, and 29, added by St. 2009, c. 28, s. 84.

### **Definition and Precedent: Incidental Local Administration Expenses**

The Local Mandate Law sets the general rule that post-1980 state laws that impose new costs at the local level must either be fully funded by the Commonwealth, or subject to local acceptance. One exception to this general rule is that the Commonwealth need not assume the cost of mandates that impose only “incidental local administration expenses.” G. L. c. 29, s. 27C(a). The Supreme Judicial Court defines this term as “...relatively minor expenses related to the management of municipal services...subordinate consequences of a municipality’s fulfillment of primary obligations.” See *Worcester* at 758. In this aspect of the case, the Court reviewed a post-1980 amendment to Department of Education regulations that required schools to send out notices to parents whose children were screened for special education, but were determined not to be in need of special services. (The prior notice requirement extended only to parents whose children were going to be referred for evaluations.) DLM had previously concluded that the Local Mandate Law applied to the amendment, and certified compliance costs for the City of Worcester in excess of \$114,000. The Court disagreed, however, and concluded that the amendment imposed only incidental administration expenses. The Court deemed this notice requirement to be a “relatively minor expense,” stating that it was a “subordinate consequence” of the primary pre-1981 duty to identify children with special needs.

### **“Relatively Minor Expenses”**

In light of this precedent, we would expect that the potential cost of complying with the record-keeping and distribution provisions of the Ethics Reform Act would amount to “relatively minor expenses.” The State Ethics Commission allows employers to meet these requirements by paper or electronic means. See the Commission’s “Mandatory Education and Training Requirements – Implementation Procedures.” We would expect that the greater cost impacts would occur in cases where computer-assisted compliance is not possible or impractical. In such instances, expenses will include the cost of copying (the summary of the Conflict of Interest Law for municipal employees and acknowledgement form span 7 pages), and the cost of storage of the 2 pages containing the employee acknowledgements and notices of completion with the training program (notices of completion must be kept for 6 years.)

We note that none of the petitioners in this matter suggest the need to hire additional personnel to implement these requirements. Although these administrative tasks represent

periodic additional work, it is expected that these tasks would fit within the regular routine of existing administrative staff. From those petitioners that provided administrative cost estimates, most of the reported amounts were comprised of allocations of the time of existing personnel currently on payroll. In this aspect, the administrative requirements of the Ethics Reform Act are not imposing additional costs above the ordinary daily operating expenses of local government.

We do, however, recognize that communities will incur additional costs for administrative supplies, and in some cases, for storage equipment. We estimated the cost of supplies and storage cabinets needed for compliance by paper for the petitioner/employer that reported the greatest number of full and part-time employees, 1,900, and increased that number to 2,500 to capture the potential cost impact for elected, appointed, volunteer and seasonal workers. Using a high-end estimate of 10 cents per page, it would cost approximately \$1,750 to reproduce the summary of the Ethics Law for distribution to all categories of employees. A case of 2,500 envelopes would cost about \$80.<sup>2</sup> Assuming approximately ½ of the summaries would need to be mailed (as opposed to electronic or manual distribution), postage expenses would approximate \$765. As acknowledgements and notices accumulate over the 6-year retention period, an additional file cabinet may be required, for approximately \$300. These amounts total to \$2,895, or approximately \$3,000, to comply with the record-keeping and distribution of summaries requirements for a community employing 2,500 individuals. We made similar projections for the City of Boston, the largest municipal employer in the state with approximately 7,500 employees, resulting in an estimated annual compliance cost of \$18,500. In either case, these administrative compliance costs appear to fall well within the parameters of “relatively minor expenses” reviewed in the Worcester decision.

### **Subordinate Consequences of Primary Obligations**

Finally, the Worcester court wrote that “incidental administration expenses” are not only relatively minor in cost, they are also “subordinate consequences of a municipality’s fulfillment of primary obligations.” In the case at hand, cities and towns have been historically responsible for maintaining a variety of employee records, and for providing access to legal advice to any employee with questions relative to proper conduct under the Conflict of Interest Law. Local counsels have been required to make written opinions on such questions available to the public by filing them with the local clerk. G. L. c. 268A, s. 22. These provisions took effect as a result of enactments in 1962 and 1964, and thereby establish the primary duty in pre-1981 law that municipal employers assist their employees in their duty to understand and comply with G. L.c. 268A. It is DLM’s opinion that the record-keeping and distribution of summaries requirements of the Ethics Reform Act are “subordinate consequences” of this primary pre-1981 duty.

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<sup>2</sup> We referenced the state Operational Services Division state contract for approximate prices for envelopes printed with return addresses and file cabinets.

## **Conclusion**

In light of the precedent outlined above, it is the opinion of DLM that the Ethics Reform Act, St. 2009, c. 28, is not subject to the Local Mandate Law, G. L. c. 29, s. 27C. This conclusion is based primarily in the finding that the Act imposes no more than incidental administration expenses upon cities and towns. Please be advised that this conclusion does not prejudice your right to seek judicial review of the issues pursuant to G. L. c. 29, s. 27C (e).

Nonetheless, after hearing the presentations made by you and your municipal colleagues, we see that there is a good deal of confusion as to how the Ethics Reform Act must be implemented at the local level. We also appreciate the fact that even "incidental" expenses are difficult to absorb in the current economic climate. Yet, the Local Mandate Law simply does not shield local governments from every type of state regulation of local operations. For these reasons, Auditor DeNucci has separately asked the Office of the State Ethics Commission to work with us to identify administrative, and if necessary, legislative remedies. Please see enclosure. We will stay in touch with you through the Massachusetts Municipal Association throughout this process. In closing, we commend and appreciate your commitment to continue the best possible local services in this most difficult of times.

Sincerely,

A handwritten signature in cursive script that reads "Emily D. Cousens". The signature is written in dark ink and is positioned above the printed name and title.

Emily D. Cousens, Esq., Director  
Division of Local Mandates

Enclosure