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Jennifer Dopazo Gilbert, Esq.  
Law Office of Robert L. Allen, Jr., LLP  
300 Washington Street  
Brookline, MA 02445

Re: Massachusetts Port Authority Community Advisory Committee  
Request for Informal Opinion

Dear Attorney Gilbert:

I write in response to your inquiry regarding the applicability of the Massachusetts Tort Claims Act, G.L. c. 258, to the Massachusetts Port Authority Community Advisory Committee ("CAC"). Specifically, you inquired as to whether CAC members and a proposed executive director would be considered "public employees" under G.L. c. 258. At this time, the Attorney General's Office does not take a position as to whether CAC employees are or are not "public employees" for purposes of G.L. c. 258. Such a determination would need to be made by a court. However, in response to your request, we have reviewed the relevant case law, the enabling statute (St. 2013, c. 46, § 55), and CAC's by-laws, and uncovered the following.

The term "public employee" is defined in G.L. c. 258, § 1, as "elected or appointed, officers or employees of any **public employer**, whether serving full or part time, temporary or permanent, compensated or uncompensated..." (emphasis added) Under this definition, it appears that CAC members are "appointed" and any executive director is an "employee" so as to meet the first part of the definition of "public employee." The more difficult question is whether CAC is a "public employer."

G.L. c. 258, § 1, defines a "Public Employer" as:

*"the commonwealth and any county, city, town, educational collaborative, or district, including the Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts Turnpike Authority and any public health district or joint district or regional health district or regional health board established pursuant to the provisions of*



*section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or cooperative which operates a telecommunications system pursuant to section 47E of chapter 164, department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Port Authority, or any other independent body politic and corporate.*” (emphasis added)

A small number of cases have addressed the issue of whether an entity is a “public employer” under G.L. c. 258, § 1. Each case has focused on the question of whether the entity is an “independent body politic and corporate.”

In *Kargman v. Boston Water and Sewer Commission*, the Massachusetts Appeals Court found that the Boston Water and Sewer Commission (“BWSC”) was an “independent body politic and corporate.” 18 Mass. App. Ct. 51, 56 (1984). At the time, the MBTA, Massport, and the Massachusetts Turnpike Authority were expressly excluded from definition of “public employer.” The Appeals Court noted that all three of these agencies were “hybrid, possessing attributes of both private corporations and governmental agencies” and that they each had financial and political independence. The court added that, “[a]bsent plain statutory direction, it devolves on the courts to decide on a case by case basis whether a particular body politic and corporate should be treated as ‘more public than private.’” Finding that BWSC was both financially and politically independent, the Appeals Court concluded that it was an “independent body politic and corporate.” *Id.* at 56-59.<sup>1</sup> Although the Massachusetts Legislature later amended the definition of “public employer” to expressly include water and sewer commissions such as BWSC, Massachusetts courts have continuously applied the *Kargman* financial and political independence test when asked to determine if an entity is “public employer” under G.L. 258, §1.<sup>2</sup>

Applying the *Kargman* test to CAC is difficult. In a strict sense, CAC is not financially independent because it does not fund itself. However, CAC’s funding comes from Massport, which does (primarily) fund itself and is expressly excluded from the definition of “public employer.” See St. 2013, c. 46, § 55(i), G.L. c.91 App. §1-14, and G.L. c.258, §1. The fact that CAC relies on Massport’s “non-public” funds may lead a

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<sup>1</sup> The SJC would later affirm and adopt the Appeals Court’s determination that BWSC was an “independent body politic and corporate,” in a separate matter. See *Boston Water and Sewer Com’n v. Metropolitan Dist. Com’n*, 408 Mass. 572, 576 (1990) (discussing *Kargman* and noting “we likewise decline BWSC’s invitation to define it as anything but an ‘independent body politic and corporate.’”)

<sup>2</sup> See *Comnesso v. Hingham Housing Authority*, 399 Mass. 805, 808 (1987); *Dattoli v. Hale Hosp.*, 400 Mass. 175, 179 (1987); *Jarry v. Medical Professional Ins. Ass’n*, WL 1304261 at 2-3 (Mass. Sup. Ct. 1995); *Lafayette Place Associates v. Boston Redevelopment Authority*, 427 Mass. 509, 532-533 (1998); *Plymouth Rock Assur. Corp. v. Sabin*, WL 1500847 at 2-3 (Mass. App. Div. 2007); and *Kpakolo v. Harrigan*, WL 4200592 at 1 (Mass. App. Div. 2008).

court to find that CAC is “more private than public,” even if it is not itself “financially independent” in the strictest sense of the term.

CAC’s political independence also seems unclear. The fact that CAC members are appointed by the chief executive officer of the cities and towns they represent does not resolve the question of their political independence. The CAC enabling statute does not provide that the members “report” to the city or town officers who appointed them or be formally guided by them in their work on the CAC. Rather, the members make recommendations to Massport, the Governor and Legislature. The CAC enabling statute is also silent as to how members can be removed. Article I, ¶ 3 of the CAC By-Laws indicates that a member can be removed by the appointing CEO but provides for removal only for cause. This factor seems analogous to Massport’s Board of Directors, who are similarly appointed by the Governor but can be removed only for cause and are considered politically independent. *See Plymouth Rock Assur. Corp. v. Sabin*, WL 1500847 at 2-3 (Mass. App. Div. 2007) (noting both that, prior to a 2009 amendment making the MBTA a “public employer,” the MBTA was considered politically independent even though its board of directors were appointed by the Governor and that the Governor can only remove directors for cause.)

If a court were to find sufficient ambiguity in the question of CAC’s financial and political independence, it is possible that it might deem CAC a public employer. In *Lafayette Place Associates v. Boston Redevelopment Authority*, 427 Mass. 509, 532-533 (1998), the SJC ruled:

*Any doubts about [an agency’s] status under the difficult and uncertain designation of “independent body politic and corporate” should be resolved against such a designation, because of the desirability of making the c. 258 regime as comprehensive as possible, thus avoiding reintroducing the ‘crazy quilt’ of immunities.*

However, it is difficult to predict whether a court would be willing to accept that there is such ambiguity regarding CAC’s status rather than simply making a determination one way or the other. It is also difficult to predict whether such a decision would withstand appellate scrutiny.

For these reasons, the AGO is unable to give you a definitive answer as to whether CAC would be considered a public employer.

CAC may wish to seek a legislative amendment to answer this question definitively. The Legislature could provide clarity, as it has done on numerous occasions in the past, by amending G.L. c. 258, § 1 to expressly include or exclude CAC in the definition of “public employer.”

I hope this letter is of assistance as you determine the best course of action for CAC and its members. Should you have any further questions or concerns regarding this issue, please feel free to contact me.

Sincerely,



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