

ADVICE



EDUCATION



DISCLOSURE



ENFORCEMENT

2022
State Ethics Commission
Public Resolutions

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
One Ashburton Place, Room 619
Boston, MA 02108
617-371-9500
www.mass.gov/orgs/state-ethics-commission

Included in this publication are:

State Ethics Commission Formal Advisory Opinion issued in 2022

Cite Conflict of Interest Law Formal Advisory Opinion as follows: *EC-COI-22-(number)*.

State Ethics Commission Advisories issued in 2022*

Cite Conflict of Interest Advisories as follows: Advisory-22-(number).

**State Ethics Commission Public Resolutions including Decisions and Orders, Disposition
Agreements and Public Education Letters issued in 2022**

Cite Public Resolutions by name of subject, year, and page, as follows:

In the Matter of John Doe, 2022 SEC (page number).

Typographical errors in the original texts of Commission documents have been corrected.

*No Advisories were issued in 2022

State Ethics Commission
Advisory Opinion and Advisories
2022

Summary of 2022 Advisory Opinion *i*

EC-COI-22-1 942

Summary of Advisory Opinion Calendar Year 2022

EC-COI-22-1- Section 17(a) of the conflict of interest law prohibits a municipal zoning board of appeals (ZBA) member from accepting compensation from private clients for architectural services in connection with an application that would require ZBA approval. For purposes of Section 17(a), a municipality is a party to and has a direct and substantial interest in any submission or application reviewed or decided by the ZBA, such as a special permit application or site plan approval request. Accordingly, a ZBA member is prohibited under Section 17(a) from receiving compensation, directly or indirectly, in relation to an application for a special permit, site plan review, or other particular matter before the ZBA. The Commission declined to reconsider its well-established precedent under Section 17(a) in this case, including any application of the federal factors set forth in 5 CFR §2641.201(j)(2)(ii).

**CONFLICT OF INTEREST OPINION
EC-COI-22-1**

Facts:

A member of a city Zoning Board of Appeals (ZBA) is an architect and owner of a private architectural firm. He would like to receive compensation for services he or his firm performs for private clients in connection with applications before the ZBA, including projects for which his firm is not the architect of record. The ZBA member would not act as an agent for any private party with a matter before the ZBA and would recuse himself from participating as a ZBA member in the projects associated with his firm. Members of the city's ZBA have been designated as special municipal employees.

Question:

May the ZBA member receive compensation from private clients for architectural services he or his firm performs in connection with an application before the ZBA?

Answer:

No, the ZBA member's receipt of such private compensation would violate G.L. c. 268A, § 17(a).

Analysis:

The ZBA was established pursuant to the state's Zoning Act, G.L. c. 40A. The Zoning Act defines "zoning" as "ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants." G.L. c. 40A, § 1A. The ZBA's powers include hearing and deciding applications for special permits and approvals of site plans in certain city districts.

Under Section 17(a) of the conflict of interest law, G.L. c. 268A, a municipal employee may not directly or indirectly receive compensation from a private party in relation to any "particular matter" in which the

municipality is a "party or has a direct and substantial interest." G.L. c. 268A, § 17(a). The particular matters at issue here are the applications before and decisions of the ZBA (not the private developments subject to the city's zoning ordinance). G.L. c. 268A, § 1(k).

The ZBA member, as a special municipal employee, is subject to Section 17(a) only in relation to a particular matter in which he has at any time participated as a municipal employee, or which is or within one year has been a subject of his official responsibility, or which is pending in the ZBA if he served more than sixty days during any period of 365 consecutive days. G.L. c. 268A, § 17. Even if he recuses himself from the discussion and vote on matters involving his own firm, the ZBA member still has official responsibility for all matters subject to the ZBA's review. As a result, he is subject to Section 17(a) with regard to matters coming before the ZBA, even if he does not participate as a ZBA member in the particular matters. *In the Matter of Lawrence Beals*, 2020 SEC 2676; *In the Matter of Jeffrey Collingwood*, 2018 SEC 2639; EC-COI-99-6; EC-COI-92-36.

In *Commonwealth v. Canon*, 373 Mass. 494 (1977), the Supreme Judicial Court concluded that the granting of a special permit for an apartment building is a particular matter for purposes of Section 17(a) of the conflict of interest law. The Court noted, "[i]t is hard to hypothesize a 'particular matter' involving a municipal action in which it can be said with assurance that the municipal interest is indirect or unsubstantial." *Canon*, 373 Mass. at 498. *See* Robert Braucher, *Conflict of Interest in Massachusetts, in Perspectives of Law: Essays for Austin Wakeman Scott* 1, 16 (1964); EC-COI 84-117; EC-COI 88-21. The court further noted that for purposes of Section 17, the city is a party when "the payor is applying for a municipal decision and the city is cast in the role of objective and impartial arbiter." *Canon*, 373 Mass. at 498. *See* EC-COI-84-117.

Following *Canon*, the Commission has concluded in a number of enforcement cases and formal advisory opinions that an application for a special permit or other types of permits, is a particular matter in which the municipality is a party and has a direct and substantial interest for purposes of Section 17. *See*,

e.g., *In the Matter of John Beukema*, 1995 SEC 732 (finding zoning board of appeals member who was an architect violated Section 17(a) by receiving compensation from a private developer in connection with a special permit site plan review application submitted to the zoning board of appeals); *In the Matter of Richard L. Reynolds*, 1989 SEC 423 (finding select board member violated Section 17(c) by acting as agent for a trust in connection with a private subdivision application); EC-COI 88-9 (concluding that the town has a direct and substantial interest in an application for, and issuance of, a building permit); EC-COI 87-31 (concluding town is a party to and has direct and substantial interest in a septic permit).

Based on Canon and Commission precedent, a municipality is a party to and has a direct and substantial interest in any submission or application reviewed or decided by the ZBA, such as a special permit application or site plan approval request. Accordingly, the ZBA member is prohibited under Section 17(a) from receiving compensation, directly or indirectly, in relation to an application for a special permit, site plan review, or other particular matter before the ZBA. *See In the Matter of William J. Devlin*, 1998 SEC 915 (finding historical commission member who was architect violated Section 17(a) by receiving compensation for preparation of plans submitted in support of application for certificate of appropriateness to be approved by the commission).

The ZBA member has argued that the Commission should rely on a regulation issued by the federal Office of Government Ethics (OGE) interpreting 18 U.S.C. § 207, which places restrictions on a former federal employee's representation of a private party in connection with particular matters in which the United States "is a party or has a direct and substantial interest." 18 U.S.C. § 207; 5 CFR § 2641.201. In particular, in determining whether a federal agency is a party to or has a direct and substantial interest in a matter involving a former federal employee, the OGE directs agencies to "consider all relevant factors, including whether:

(A) The [agency] has a financial interest in the matter;

(B) The matter is likely to have an effect on the policies, programs, or operations of the [agency];

(C) The [agency] is involved in any proceeding associated with the matter, e.g., as by having provided witnesses or documentary evidence; and

(D) The [agency] has more than an academic interest in the outcome of the matter.”

5 CFR §2641.201(j)(2)(ii).

The Commission has not adopted these federal factors to determine whether a municipality is a party to or has a direct and substantial interest in a particular matter involving a current municipal employee. Even if it did, the ZBA member would not prevail.

Applying the third factor (agency involvement), the ZBA is directly involved in the particular matters with which he would be professionally associated because they would be reviewed and acted upon by its members. Moreover, applying the fourth factor (agency interest), the ZBA, which was created to enforce the city's extensive zoning ordinance, has more than an academic interest in the outcome of its matters. An important purpose of the city's zoning ordinance is to protect the health, safety and general welfare of the city's present and future inhabitants. G.L. c. 40A, § 1A. Therefore, the considerations set forth in the third and fourth factors are clearly met and support a finding that the city is a party to and has a direct and substantial interest in matters submitted to and decided by the ZBA.

Conclusion:

The Commission declines to reconsider its well-established precedent under Section 17(a) in this case, including any application of the federal factors set forth in 5 CFR §2641.201(j)(2)(ii). Indeed, allowing a ZBA member to receive compensation in relation to matters decided by the very board upon which he sits would undermine the public's confidence in the integrity of his public service. *See William G. Buss, Jr., The Massachusetts Conflict-of-Interest Statute: An*

Analysis, 45 B.U. L. Rev. 299, 301 (1965). In sum, Section 17(a) prohibits the ZBA member from receiving compensation from private clients for architectural services he or his firm performs in connection with an application before the ZBA.

DATE AUTHORIZED: March 17, 2022

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In the Matter of Albert Ganem

The Commission issued a Public Education Letter to Hampden-Wilbraham Regional School District Superintendent Albert Ganem after finding reasonable cause to believe he violated the conflict of interest law by participating in the hiring of his spouse and daughter to positions in the school district. The law prohibits municipal employees from participating in matters in which members of their immediate family have a financial interest. The Commission found reasonable cause to believe Ganem violated this prohibition by, as superintendent, directing and approving his spouse's hiring and suggesting and approving his daughter's hiring. The Commission also found reasonable cause to believe Ganem violated the law's prohibition against public employees using their official positions to secure valuable unwarranted privileges or benefits for anyone by his actions as superintendent relating to the hirings of his spouse and daughter outside of the district's established hiring process. In addition, the conflict of interest law prohibits a public employee from acting in a manner that would cause a reasonable person who knows the relevant facts to believe the employee would be biased or unduly influenced in their official acts. The Commission found reasonable cause to believe Ganem violated this prohibition because a reasonable person knowing the facts would conclude that Ganem would unduly favor his spouse and daughter in his actions as superintendent. The Commission chose to resolve the allegations against Ganem through the Public Education Letter rather than through adjudicatory proceedings because it determined that the public interest would be better served by publicly discussing how the conflict of interest law applies to his alleged actions. The Commission took into consideration that Ganem self-reported the matter to the Commission and fully cooperated with the Commission's investigation, and that Massachusetts public schools faced unprecedented staffing challenges in 2020 due to the COVID-19 pandemic. The Commission expects that the letter will provide public employees in similar circumstances with a clearer understanding of how to comply with the law.

In the Matter of Daniel Keefe

The Commission approved a Disposition Agreement in which former Blackstone Selectman Daniel Keefe admits to violating the conflict of interest law by, as a selectman, discussing proposed stipends and pay raises for town employees including his spouse, and later criticizing a town investigation into his actions.

The law prohibits public employees from participating as such in matters in which they or their immediate family have a financial interest. Keefe violated this prohibition by participating as a selectman in the discussion of a proposal that would affect his spouse's compensation. Keefe also violated this prohibition by, as a selectman, criticizing the town investigation report because he knew he had a financial interest in the referral of the report to the State Ethics Commission, as a finding by the Commission that he had violated the conflict of interest law could result in his having to pay civil penalties. Keefe paid a \$4,500 civil penalty for the violations.

In the Matter of Richard Theroux

The Commission approved a Disposition Agreement in which former Hampden County Regional Retirement Board Member Richard Theroux admits to violating the conflict of interest law by obtaining reimbursements from the Board for falsely claimed lodging expenses and, as a Board member, approving those reimbursements. The law prohibits public employees from using their official positions to obtain valuable unwarranted benefits, participating officially in matters in which they have a financial interest, and presenting false or fraudulent claims to their employer for valuable payments or benefits. Theroux violated the conflict of interest law when he submitted falsified lodging reimbursement forms, acted in his official capacity to approve and sign his own requests for reimbursement, and approved and signed off on Board expenditures including reimbursement payments to himself. Theroux paid a \$10,000 civil penalty for the violations.

In the Matter of Leo Sacco

The Commission approved a Disposition Agreement in which former Medford Police Chief Leo Sacco admits to violating the conflict of interest law by failing to appropriately discipline Medford police officers who made false claims for detail pay, not requiring them to return more than \$17,000 in falsely claimed detail pay and concealing the matter from the mayor. The law prohibits public employees from using their official positions to provide anyone with a valuable privilege or exemption to which they are not entitled. Sacco violated this prohibition by failing to appropriately discipline the officers who falsely claimed detail pay, by failing to require them to pay back the unearned pay, and by failing to report the matter to the mayor. The law also prohibits a public employee from acting in a manner that would cause a

reasonable person aware of the relevant facts to believe the employee would be improperly influenced or show undue favoritism in their official acts. Sacco's mishandling of the investigation and discipline of the officers who falsely claimed detail pay would have caused a reasonable person to believe that those officers could unduly enjoy his favor in the performance of his duties as police chief. Had Sacco followed established Medford Police protocol, the culpable officers would have been officially and substantially disciplined, as they were after Sacco's retirement. Sacco paid a \$9,000 civil penalty for the violations.

In the Matter of Stacia Castro

The Commission approved a Disposition Agreement in which former director of the state MassHealth Specialty Provider Network Stacia Castro admits to violating the conflict of interest law by, while a state employee, soliciting and receiving free Boston Red Sox tickets and other things of value from the contractor administering the MassHealth dental program. The law prohibits public employees from soliciting or receiving anything worth \$50 or more for or because of their public positions that is not authorized by statute or regulation. Castro violated this prohibition by repeatedly asking DentaQuest, state contractor with whom she regularly interacted in her official position, for Red Sox tickets and by receiving the free tickets, tour, and meal voucher from the company. Castro paid a \$6,000 civil penalty for the violations.

In the Matter of Kevin Clayton

The Commission issued a Public Education Letter to Massachusetts Environmental Police Major Kevin Clayton after finding reasonable cause to believe he violated the conflict of interest law by providing an attorney with whom he is friendly the opportunity to promote his private law practice at a mandatory MEP training. The law prohibits public employees from using their official positions to provide anyone with a valuable benefit to which they are not entitled. The Commission found reasonable cause to believe Clayton violated this prohibition by using his official position and public worktime to provide the attorney with the valuable opportunity to promote his private law practice to a captive audience of MEP officers at the mandatory training session. The Commission also found reasonable cause to believe Clayton, by allowing the attorney to present at the MEP training without first disclosing their personal relationship, violated the conflict of interest law's prohibition against public employees acting in a manner that would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their

favor in the performance of their official duties. The Commission chose to resolve the allegations against Clayton through the issuance of the Public Education Letter rather than an adjudicatory proceeding because it determined the public interest would be better served by publicly discussing the application of the conflict of interest law to Clayton's alleged actions. The Commission expects that the letter will provide public employees in similar circumstances with a clearer understanding of how to comply with the law.

In the Matter of Melissa Fay

The Commission approved a Disposition Agreement in which Wareham Public Schools Director of Student Services Melissa Fay admits to violating the conflict of interest law by hiring her mother and participating in hiring her son for jobs in the school district. The law prohibits municipal employees from participating as such in matters in which their immediate family has a financial interest. Fay violated this prohibition by participating as Director of Student Services in the hiring of her son, by hiring her mother, and by approving payment of her mother's invoices. In addition, by failing to follow the school district's established procedures when hiring her mother and when participating in the hiring of her son, Fay violated the conflict of interest law's prohibition against public employees using their official positions to obtain valuable benefits or privileges for themselves or others to which they are not entitled. Fay paid a \$4,000 civil penalty for the violations.

In the Matter of Robert O'Brien

The Commission issued a Final Order approving a Disposition Agreement in which former Sandisfield Highway Road Superintendent Robert O'Brien admits to repeatedly violating the conflict of interest law by deciding to hire his private business to provide services to the town more than 90 times, signing off on town payments to his business more than 40 times, using inside town information to underbid competitors for a town contract, using his public position to solicit private work, and having the town billed for materials his business used to do private jobs. O'Brien violated the conflict of interest law's prohibition against municipal employees participating as such in matters in which they know they have a financial interest when, as Highway Road Superintendent, O'Brien decided that the town would hire P&R to plow snow and rent equipment from P&R, and when he signed Highway Department warrants that included payments to P&R, O'Brien knew he had a financial interest in each of these matters because P&R was his business. In addition, by, as P&R, renting equipment to the town, O'Brien violated the law's prohibition against municipal employees having a financial interest in

contracts with their employing municipality. O'Brien also violated the conflict of interest law's prohibition against public employees using their official position to obtain valuable benefits to which they are not entitled by taking advantage of his position as Highway Road Superintendent to review competitors' quotes for the excavator rental to the town before submitting a lower quote from P&R, to have the town billed for materials and trucking delivery services P&R used for private work, and to solicit erosion control work for P&R. In addition, being paid by the contractor through P&R to do the erosion control work on a town road violated the conflict of interest law's prohibition against municipal employees being compensated by someone other than the municipality in connection with a matter in which the municipality has a direct and substantial interest. The Commission accepted O'Brien's payment of a \$50,000 civil penalty and dismissed the adjudicatory proceeding against him.

In the Matter of Susan Anderson, Joseph D. Early, Jr., Richard McKeon and Jeffrey Travers

The Commission issued a Final Decision and Order dismissing its case against Worcester County District Attorney Joseph D. Early Jr., Senior First Assistant District Attorney Jeffrey Travers, former State Police Colonel Richard McKeon, and former State Police Major Susan Anderson after finding that it had not been proved that they violated the conflict of interest law by their actions relating to the police report of the arrest of a judge's daughter. In its Final Decision and Order, the Commission found the evidence did not prove that the benefit the judge and/or his daughter purportedly would have received by having the arrest report revised and replaced as attempted was of substantial value. Because the substantial value of the alleged benefit improperly secured is an essential element of the violation alleged, after determining substantial value had not been proved, the Commission did not address any other element of the alleged violation. The Commission also found it had not been proved that Early, Travers, McKeon, and Anderson violated the conflict of interest law's prohibition against public employees acting in a manner that would cause a reasonable person to conclude that they would act or fail to act in performing an official duty because of kinship, rank, or undue influence from another person because it had not been proved that the actions of Early, Travers, McKeon, or Anderson would cause a reasonable person to conclude they had been unduly influenced by the judge or his daughter.

In the Matter of Gary Haley

The Commission issued a Final Decision and Order finding that Aquinnah Select Board member Gary Haley violated the conflict of interest law by selecting himself to install underground conduits for utility wires for the town and by approving the town's payment of his \$17,445 invoice for the work. The law prohibits municipal employees from participating in their official capacity in matters in which they know they have a financial interest. The Commission found that Haley violated this prohibition when, as a Select Board member, he decided that he would install the conduits, unilaterally decided that the town would be charged for the work, determined on his own what the payment to himself would be, and then signed off on the town's payment to himself. The Commission found that Haley did not violate the section of the conflict of interest law prohibiting municipal employees from contracting with their employing municipality because no contract with the town was created when Haley first offered the town a gift of his services, then billed the town for his work after the scope of that work expanded. The Commission also found that it was not established that Haley violated the conflict of interest law's prohibition against a municipal employee submitting a false or fraudulent claim for payment to the town when he charged the town for 22 hours of work by himself and two laborers. The Commission found it was not proved that Haley did not do this work. Although the evidence raised questions regarding whether two laborers Haley claimed to have paid performed the work or whether other workers did this work without receiving pay from Haley, the Commission found it was not proved that the town did not receive 22 hours of work by two laborers. The Commission ordered Haley to pay a \$10,000 civil penalty for the violations.

In the Matter of Brooke Merkin

The Commission issued a Final Order allowing a Joint Motion to Dismiss and approving a Disposition Agreement in which Brooke Merkin, a former employee of the Center for Health Information and Analysis (CHIA) and the Executive Office of Technology Services and Security (EOTSS), admits to violating the conflict of interest law by holding the two paid fulltime state positions at the same time and seeking payment from both state agencies for 31 overlapping work hours. The law prohibits state employees from knowingly having a financial interest in a state contract. Merkin violated this prohibition by accepting a second paid state job, a state contract, while already employed by the Commonwealth. In addition, when Merkin submitted timesheets to CHIA and EOTSS for overlapping hours, she violated the law's prohibitions against public employees submitting false or fraudulent claims for payment to

their employer and using or attempting to use their official positions to obtain substantially valuable benefits for themselves or others that are not properly available to similarly situated individuals. The Commission accepted Merkin's payment of a \$2,500 civil penalty and dismissed the adjudicatory proceeding against her.

In the Matter of Christine Emerson

The Commission approved a Disposition Agreement in which Cheshire Town Clerk Christine Emerson admits to violating the conflict of interest law by hiring her daughter and granddaughter to perform work for the town on multiple occasions. The law prohibits municipal employees from participating officially in matters in which members of their immediate family have a financial interest. Emerson violated this provision by hiring her daughter, setting her rate of pay, and completing her pay vouchers. In addition, the law prohibits public employees from acting in a manner that would cause a reasonable person to believe they would unduly favor another person when performing an official act. Emerson violated this prohibition when she hired her granddaughter, set her pay, and completed her pay vouchers. Finally, the conflict of interest also law prohibits public employees from using their official positions to obtain valuable unwarranted benefits not available to others in similar situations. Emerson violated this prohibition by setting her daughter's and granddaughter's census pay structure as a per envelope rate that was not properly available to other town employees. Emerson paid a \$5,000 civil penalty for the violations.

In the Matter of Robert Gray

The Commission approved a Disposition Agreement in which former state Division of Capital Asset Management and Maintenance (DCAMM) project engineer Robert Gray admits to violating the conflict of interest law by routinely using his state position to obtain cars DCAMM rented for work purposes for his personal, non-work-related travel. The law prohibits public employees from using their official positions to obtain valuable unwarranted benefits, and from presenting their public employer with false or fraudulent claims for payments or benefits. Gray violated the conflict of interest law when he used his position to obtain rental cars through DCAMM's finance office while intending to use the cars for personal purposes. Gray paid a \$5,000 civil penalty for the violations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

IN THE MATTER OF
ALBERT GANEM

PUBLIC EDUCATION LETTER

March 2, 2022

Albert Ganem
c/o Attorney Michael Long
175 Derby Street, Unit 17
Hingham, MA 02043

Dear Mr. Ganem:

As you know, the State Ethics Commission authorized a preliminary inquiry into whether you violated the state conflict of interest law by, while serving as the Superintendent of the Hampden-Wilbraham Regional School District ("District"), participating in the hiring of your spouse and daughter to positions in the District during the 2020-2021 school year.

On January 19, 2022, the Commission voted to find reasonable cause to believe that your actions violated three sections of the conflict of interest law, as explained below. The Commission did not, however, authorize adjudicatory proceedings against you as it determined that the public interest would be better served by resolving this matter through this Public Education Letter discussing the relevant facts and explaining how the conflict of interest law applies to them. In deciding on this non-punitive resolution, the Commission took into consideration that you self-reported this matter to the Commission, that you fully cooperated with the Commission's investigation, and that Massachusetts public schools faced unprecedented staffing challenges in 2020 due to the COVID-19 pandemic.

By resolving this matter through this Public Education Letter, the Commission expects that you and public employees in circumstances similar to those described below will as a result have a clearer understanding of the conflict of interest law and how to comply with it. The Commission and you agree that this matter will be resolved publicly with this educational letter and that there will be no formal proceedings against you. You have chosen not to exercise your right to a hearing before the Commission.

The Facts

You have served as the Superintendent of the District since 2015. Pursuant to G.L. c. 71, § 59B, the hiring of teachers and other school staff is subject to your approval as Superintendent.

The hiring of your spouse

The District's Mile Tree Elementary School began remote teaching during the 2020-21 school year due to the COVID-19 pandemic. Some time after classes began, you had a conversation with a kindergarten teacher who indicated that she was overwhelmed. You stated that you believed your spouse, a licensed teacher, would be interested in helping out. The teacher told you she would be very grateful, as the school was "critically understaffed."

Soon thereafter, you, as Superintendent, instructed the school's Director of Curriculum & Instruction to hire your spouse, which he did. You subsequently approved the hiring. Your spouse was not interviewed for the position and did not go through the school's regular hiring process, including appointment by the principal. At the time you spoke with the teacher, a remote kindergarten teaching position had not been posted. After your spouse began working for the school, a remote kindergarten position was posted, but none of the candidates who applied for the position were considered for hiring.

Your spouse worked remotely for the Mile Tree Elementary School during the 2020-21 school year for six hours per week, with four hours of "prep time," at \$40 an hour, and earned a total of \$5,480.00. Staff described your spouse as "very professional" and a "phenomenal teacher."

The hiring of your daughter

On May 22, 2020, the District issued an internal posting for a summer school special education position for the summer of 2020. After the posting closed on June 5th you had a conversation with a staff member involved in the hiring who told you that, while normally the District sees a lot of interest from teachers to help with summer school, the District was having difficulty in recruiting internal staff in 2020. You told the staff member that your daughter was a licensed special education teacher in Worcester and offered to ask your daughter if she was interested. You also told the staff member that she had no obligation to hire your daughter.

Soon thereafter, your daughter contacted the staff member. Another staff member interviewed her and reported that she fit all of the qualifications for the position. The Mile Tree Elementary School hired her and you, as Superintendent, approved the hiring. She worked for \$25 an hour and earned a total of \$1,162.50.

District nepotism policy

The District's policy on nepotism states that the District will not employ a member of the Superintendent's immediate family "unless written notice is given to the School Committee of the proposal to employ at least two weeks in advance of such person's employment or assignment." The District's policy is founded on state law.¹

You reported to the School Committee on April 1, 2021 that your daughter had worked for the District's 2020 summer program, and your spouse was currently working as a remote kindergarten teacher. You claimed the delay in reporting the employment to the School Committee was a result of an oversight. You also filed a § 23(b)(3) disclosure regarding your immediate family members' employment on April 15, 2021. The School Committee did not impose any discipline on you for not following the District's policy.

Legal Discussion

As Superintendent, you are a municipal employee subject to the state conflict of interest law, General Laws chapter 268A. Your spouse and your daughter are members of your immediate family. The hiring of immediate family members as described above implicates §§19, 23(b)(2) and 23(b)(3) of the conflict of interest law.

Section 19

Section 19 of the conflict of interest law prohibits a municipal employee from participating in a particular matter in which the employee's immediate family member has a financial interest.² Participation includes not only acting directly on a matter, but also formal and informal lobbying of colleagues, discussing, giving advice, or making recommendations in connection with the matter.

The hirings of your spouse and your daughter were 'particular matters' within the meaning of this section of the law. Both your spouse and your daughter had a financial interest in their hirings, as they were paid for their services. You participated as Superintendent in

your spouse's hiring in the District by discussing her potential employment with a staff member, instructing the school hire her, and approving her hiring. Similarly, you participated in your daughter's hiring by suggesting her hiring as a solution to the lack of internal applicants for teaching positions in the school's summer program and approving her hiring.

Even if you believed that the hiring of your family members served the public interest given the need for either immediate assistance or qualified candidates, your participation in their hirings violated the conflict of interest law, unless you received in advance a written determination from your appointing authority, the School Committee, that your family members' financial interest was not so substantial as to be deemed likely to affect the integrity of the services that the District expects of you.³ Acting in your official capacity in relation to your family members creates the appearance of favoritism and bias even if you do not give your family members special treatment.

As you did not notify the School Committee of the hirings of your spouse and daughter until several months after their employment began, there is reasonable cause to believe your actions were in violation of § 19 of the conflict of interest law.

Section 23(b)(2)

Section 23(b)(2)(ii) of the conflict of interest law prohibits a public employee from using or attempting to use his official position to obtain unwarranted privileges that are not properly available to similarly situated individuals. In general, this section prevents a public employee from using public resources for personal gain, or for the private benefit of others. Both the hiring of your spouse and that of your daughter were inconsistent with the District's established hiring practices. The District hired your spouse prior to a position being posted and without authorization by the school's principal, and hired your daughter to a position posted only for internal candidates. In addition, the hirings were in violation of the District's nepotism policy and G. L. c. 71, § 67. Being hired outside a public agency's established hiring process, in violation of an important policy of the agency, and contrary to state law, is an unwarranted privilege of substantial value that is not properly available to other candidates seeking employment with the agency. Although you did not directly hire your spouse and your daughter, you used your position as Superintendent to facilitate their hiring by asking the Director of Curriculum and Instruction to offer your spouse a position, alerting

your daughter to an opportunity that was not externally posted, and approving their hirings. Accordingly, there is reasonable cause to believe you violated § 23(b)(2) of the conflict of interest law.

Section 23(b)(3)

Finally, § 23(b)(3) of the conflict of interest law prohibits a public employee from acting in a manner that would cause a reasonable person, who knows the relevant facts, to conclude that the employee can be improperly influenced by kinship or unduly favor anyone in the performance of his official duties. Here, a reasonable person with knowledge of the facts stated above would conclude that you would unduly favor your spouse and your daughter in your official actions as Superintendent.

Generally, a public employee may avoid a violation of § 23(b)(3) by either recusing themselves from the matter in which an appearance of a conflict exists, or by filing a full written disclosure of the circumstances that create the appearance of official bias or favoritism with their appointing authority prior to participating in the matter. While you did ultimately file a § 23(b)(3) disclosure relating to your spouse and daughter, you did not do so prior to acting. Accordingly, there is reasonable cause to believe that the actions you took as Superintendent regarding your spouse's and daughter's employment with the District violated § 23(b)(3) of the conflict of interest law.

Disposition

Based upon its review of this matter, the Commission has determined that the public interest would be best served by the issuance of this Public Educational Letter and that your receipt of this letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

This matter is now closed.

Sincerely,

David A. Wilson
Executive Director

¹ Section 54 of the Education Reform Act of 1993, amended section 67 of Massachusetts General Laws chapter 71 to read, in relevant part, "A school district shall [not] employ a member of the immediate family

of a superintendent... unless written notice is given to the school committee of the proposal to employ... such person at least two weeks in advance of such person's employment."

² Section 19 prohibits a municipal employee from participating "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."

³ Specifically, § 19(b)(1) provides an exemption to this section of the law for an appointed municipal employee who, before acting, advises their appointing authority of the nature and circumstances of the particular matter and makes full disclosure of the relevant financial interest, and receives a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services the municipality may expect from the municipal employee.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss.

COMMISSION
ADJUDICATORY
DOCKET NO. 22-0002

IN THE MATTER OF DANIEL KEEFE

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Daniel Keefe ("Keefe") enter into this Disposition Agreement pursuant to Section 3 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On March 18, 2021, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A. On January 19, 2022, the Commission concluded its inquiry and found reasonable cause to believe that Keefe violated G.L. c. 268A, § 19.

The Commission and Keefe now agree to the following findings of fact and conclusions of law:

Background Facts

1. Keefe, a resident of Blackstone, was at all relevant times a member of the Town of Blackstone ("Town") Board of Selectmen ("BOS").
2. Keefe's spouse, Laurie Keefe ("Ms. Keefe") was at all relevant times the Director of the Town's Senior Center/Council on Aging, a paid municipal position.
3. In 2015, Keefe contacted the State Ethics Commission's Legal Division for advice concerning conflicts of interest that could arise with both he and his spouse serving as Town employees. Keefe was advised not to participate in any matter in which his spouse has a financial interest, including the Senior Center budget, but instead to recuse himself from any participation in all such matters. The Legal Division explained to Keefe that participation includes the discussion of a matter.

A. July 1, 2020, Meeting Regarding Town Employee Stipends and Pay Raises

Findings of Fact

4. In 2020, the Town was awarded \$822,252 of federal CARES Act funding.
5. In or about June 2020, then Town Administrator Daniel Keyes (TA Keyes) planned to propose using a portion of the CARES Act money to fund stipends for Town employees who had gone "above and beyond" during the COVID-19 pandemic by continuing to physically report to work every day.
6. In or about June 2020, TA Keyes also planned to propose pay raises for certain Town employees after budget cuts resulted in the consolidation of staff.
7. In June 2020, TA Keyes and the Town Accountant met with the heads of each Town department, including Ms. Keefe, to discuss the potential stipends and raises.
8. On June 30, 2020, TA Keyes informed Ms. Keefe that he intended to propose that she receive a \$2,000 stipend and a \$2,000 raise.
9. Later on June 30th, Ms. Keefe told Keefe that she would be receiving the stipend and raise.
10. Soon after Ms. Keefe informed Keefe about her raise and stipend, he contacted Robert Dubois, the chair of the

BOS, and Dubois agreed to meet with Keefe the following day in order to discuss the stipends and raises with TA Keyes.

11. On July 1, 2020, Keefe and Dubois met with TA Keyes at Town Hall (the "July 1st Meeting").

12. At the July 1st Meeting, TA Keyes outlined his proposal to award stipends to thirteen Town employees who reported to work every day during the pandemic. The proposed stipends ranged from \$500 to \$2,500 and totaled \$20,500. TA Keyes also outlined proposed raises for five Town employees which ranged from \$2,000 to \$10,000 for a total of \$30,000.

13. According to TA Keyes's proposal, Ms. Keefe would receive a \$2,000 stipend and a \$2,000 raise.

14. At the July 1st Meeting, Keefe suggested an alternative proposal with stipends ranging from \$500 to \$2,500 to twenty Town employees totaling \$40,000 and raises of \$6,000 to each employee.

15. Under Keefe's alternative proposal, Ms. Keefe would receive a stipend of \$2,500 and a raise of \$6,000.

Conclusions of Law

16. Except as otherwise permitted, § 19 of G.L. c. 268A prohibits a municipal employee from participating¹ as such an employee in a particular matter in which, to his knowledge, he or a member of his immediate family has a financial interest.

17. As a member of the BOS, Keefe was a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

18. Keefe's spouse is a member of his immediate family.

19. The proposal for Town employee pay raises and stipends was a particular matter.

20. Keefe's spouse, as a paid municipal employee, had a financial interest in the particular matter of the proposal for Town employee pay raises and stipends.

21. Keefe participated as a BOS member in this particular matter as a municipal employee by, at the July 1st Meeting, proposing different, and in some cases greater, stipends and pay raises for Town employees including his spouse.

22. When he participated as a BOS member in the discussion of the proposed pay raises and stipends for

Town employees and made his alternative proposal, Keefe knew that his spouse had a financial interest in the pay raise and stipend proposal.

23. Therefore, by, at the July 1st meeting, as a BOS member proposing stipends and pay raises for Town employees, including greater ones for his spouse, to replace those proposed by TA Keyes, Keefe participated as a municipal employee in a particular matter in which to his knowledge his immediate family member had a financial interest. In so doing, Keefe violated § 19.

B. Town's Investigation Related to Town Employee Stipends and Pay Raises

Findings of Fact

24. The Town engaged a law firm to investigate the actions of Keefe, Dubois and TA Keyes relating to the stipends and pay raises for Town employees.

25. The investigation report concluded that Keefe violated conflict of interest rules against self-dealing by acting on a matter in which his spouse had a financial interest and recommended that the BOS provide the report to the Ethics Commission and issue a letter of reprimand to Keefe regarding the July 1st Meeting.

26. The law firm discussed the investigation report with the BOS at a November 10, 2020 meeting.

27. While participating in the November 10th meeting as a selectman, Keefe repeatedly criticized the investigation report.

28. At the November 10th meeting, the BOS voted 3-0 in favor of forwarding the findings of the independent investigation to the Ethics Commission. Keefe abstained from the vote.

Conclusions of Law

Section 19

29. The BOS's November 10th decision to forward the findings of the law firm's independent investigation to the Ethics Commission was a particular matter.

30. Keefe participated as a BOS member in the particular matter by at the November 10th BOS meeting repeatedly criticizing the law firm's investigation report which recommended that the BOS refer the matter to the Ethics Commission.

31. When Keefe participated as BOS member in the particular matter, Keefe knew that he had a financial interest in the referral to the Ethics Commission because he knew that a finding by the Commission that he had violated the conflict of interest law could result in the imposition of civil penalties on him.

32. Therefore, by, as a BOS member, repeatedly criticizing the investigation report during the BOS's November 10, 2020, discussion of whether to refer the investigation's findings to the Ethics Commission as recommended in the report, Keefe participated as a municipal employee in a particular matter in which he knew he had a financial interest. In so doing, Keefe violated § 19.

Disposition

In view of the foregoing violations of G.L. c. 268A by Keefe, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by Keefe:

- (1) that Keefe pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$4,500 as a civil penalty for violating G.L. c. 268A, § 19; and
- (2) that Keefe waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: April 27, 2022

¹ "Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county, or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j).

SUFFOLK, ss.

COMMISSION
ADJUDICATORY
DOCKET NO. 22-0003

IN THE MATTER OF
RICHARD THEROUX

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Respondent Richard Theroux enter into this Disposition Agreement pursuant to Section 3 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On October 20, 2021, pursuant to G.L. c. 268B § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Theroux. On February 17, 2021, the Commission concluded its inquiry and found reasonable cause to believe that Theroux violated G.L. c. 268A, §§ 6, 23(b)(2) and 23(b)(4).

The Commission and Theroux now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. Theroux began serving as a member of the Hampden County Regional Retirement Board (HCRRB) in 1996. He was elected Chair of the HCRRB in 2008 and served as Chair until December 2021.
2. The Massachusetts Association of Contributory Retirement Systems (MACRS) holds an annual conference in Hyannis.
3. Theroux attended the MACRS conference every year from 2007 to 2019.
4. Each year from 2007 to 2019 when Theroux attended the MACRS conference, he lodged at property he owned in Mashpee.
5. The HCRRB requires its members who attend conferences to submit a 'Travel Reimbursement Form' and copies of receipts of their expenses before the HCRRB will reimburse the members for their expenses incurred while attending the conference.
6. Each year from 2007 to 2019, Theroux submitted a Travel Reimbursement Form that included claimed expenses for lodging.

7. Each Travel Reimbursement Form submitted by Theroux annually from 2007 to 2019 included purported lodging receipts that Theroux personally fabricated. Theroux made the fake receipts appear as if Theroux had been charged for staying in a rental property when he had not been. One receipt included a fictitious address and three included false signatures purportedly of another individual. None of the receipts included the address of the Mashpee property Theroux owned.

8. The amount Theroux sought reimbursement for each year ranged from \$330 to \$475. From 2007 to 2019, Theroux sought a total of \$5,650 in reimbursement from the HCRRB for MACRS annual conference related lodging expenses he did not incur.

9. Each Travel Reimbursement Form is signed by three members of the HCRRB for approval to be placed on the HCRRB's list of monthly expenditures. In 2017, Theroux, as an HCRRB member, signed for approval his own Travel Reimbursement Forms in which he sought reimbursement for expenses he falsely claimed to have incurred while attending the MACRS annual conference.

10. The HCRRB votes each month to approve its monthly expenditures, which are listed in a document that is also signed by three members of the HCRRB. Theroux signed the monthly expenditures each time his request for reimbursement for expenses he falsely claimed to have incurred while attending the MACRS conference appeared among the monthly expenditures in 2014, 2015, 2017, 2018. Theroux also voted to approve each monthly expenditure each time his request for reimbursement for expenses while attending the MACRS conference appeared among the monthly expenditures.

11. From 2007 and 2019, the HCRRB approved and paid, and Theroux received, a total of \$5,650 in reimbursement payments for MACRS annual conference related lodging expenses he did not incur.

12. After an audit conducted by the Public Employee Retirement Administration Commission raised concerns about the receipts Theroux had submitted with his requests for reimbursement for his claimed expenses in connection with his attendance at the MACRS annual conference, Theroux repaid the HCRRB the \$5,650 he had received.

Conclusions of Law

13. As a member of the HCRRB, Theroux was a state employee as that term is defined in G.L. c. 268A,

§ 1 (g).

Theroux violated Section 6

14. Section 6 of G.L. c. 268A prohibits a state employee from participating as such an employee in a particular matter in which to his knowledge, he, his immediate family or partner, a business organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

15. Each decision the HCRRB made to reimburse Theroux for any MACRS annual conference-related expense he claimed to have incurred was a particular matter in which Theroux had a financial interest.

16. Theroux knew he had a financial interest in the HCRRB's decisions to reimburse him for his claimed conference-related expenses.

17. Theroux participated in the HCRRB's decisions to reimburse his claimed conference-related expenses by, as a HCRRB member, signing his own request for reimbursement in 2017, signing the HCRRB's monthly expenditures that included a reimbursement to him each year from 2007 to 2019, and voting to approving those reimbursements. In so doing, Theroux violated § 6.

Theroux violated Section 23(b)(2)

18. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a public employee from knowingly, or with reason to know, using or attempting to use their official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value, and which are not properly available to similarly situated individuals.

19. Being reimbursed for expenses that were not incurred is an unwarranted privilege that is not properly available to HCRRB members or other state employees.

20. The unwarranted privileges were of substantial value because each request Theroux made each year from 2007 to 2019 for reimbursement for lodging expenses that were not included was for \$50 or more¹.

21. Theroux was aware that he did not incur the expenses for which he sought reimbursement when he submitted fabricated receipts to support his claim of reimbursement for lodging expense while attending the MACRS conference each year between 2007 and 2019 and when he approved the reimbursement to himself, and that as Chair he was in a position to avoid scrutiny of his false reimbursement claims.

22. By, while serving as HCRRB Chair submitting

phony receipts to support his false claims for reimbursement for expenses he did not incur and by as HCRRB Chair approving those reimbursements, Theroux knowingly used his official position to secure for himself substantially valuable unwarranted privileges not properly available to similarly situated individuals. In so doing, Theroux violated G. L. c. 268A, § 23(b)(2)(ii).

Theroux Violated Section 23(b)(4)

23. Section 23(b)(4) of G.L. c. 268A prohibits public employees from presenting a false or fraudulent claim to his employer for any payment or benefit of substantial value.

24. As a member and Chair, Theroux was an employee of the HCRRB and the HCRRB was his employer within the meaning of § 23(b)(4).

25. Theroux presented a false and fraudulent claim for payment to his employer, the HCRRB, each year between 2007 and 2019 when he submitted a request for reimbursement for claimed MACRS conference-related lodging expenses that he in fact did not incur. By so doing, Theroux violated G.L. c. 268A, § 23(b)(4).

Disposition

In view of the foregoing violations of G.L. c. 268A by Theroux, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by Theroux:

- (1) that Theroux pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$10,000 as a civil penalty for violating G.L. c. 268A, §§ 6, 23(b)(2)(ii) and 23(b)(4); and
- (2) that Theroux waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Disposition Agreement.

DATE: April 28, 2022

¹ Substantial value is \$50 or more. 930 CMR 5.05

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 22-0004**

**IN THE MATTER OF
LEO SACCO**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Respondent Leo Sacco enter into this Disposition Agreement pursuant to Section 3 of the Commission’s *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On September 17, 2020, pursuant to G.L. c. 268B § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Sacco. On December 22, 2021, the Commission concluded its inquiry and found reasonable cause to believe that Sacco violated G.L. c. 268A, § 23(b) subsections (2)(ii) and (3).

The Commission and Sacco now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. Sacco was the chief of the Medford Police Department (MPD) from 1990 until his retirement at age 65 in November 2018.
2. The mayor of Medford is the appointing authority for all MPD officers and the MPD chief.
3. According to Medford City Ordinance Sections 54-34, the MPD chief is responsible to, and under the direction and control of, the mayor.
4. From February to April 2018, MPD police officers were assigned, in six-hour shifts, as detail officers at a construction site in Medford (“Construction Site”). There were approximately 151 Construction Site detail assignments during this three-month detail.
5. In the spring of 2018, after the Construction Site detail

concluded, Sacco learned that some officers assigned to detail shifts at the Construction Site had submitted payment requests for hours not worked and, in some cases, the officers failed to show up for the Construction Site detail at all.

6. From May to mid-June 2018, Sacco personally investigated allegations of false claims for payment at the Construction Site. No other member of the MPD was substantially involved in the investigation.
7. Sacco conducted the investigation into the Construction Site detail false claims for detail pay allegations by reviewing detail slips and detail assignments, and by interviewing approximately thirty MPD patrol officers. Sacco did not interview any of the MPD superior police officers who were scheduled to perform details at the Construction Site.
8. The MPD has a written procedure for conducting investigations of employees which requires that interviews be recorded mechanically or by a stenographer “whenever possible.”
9. Sacco did not mechanically record the patrol officers’ interviews, nor did he have a stenographer record them.
10. Of the thirty patrol officers interviewed by Sacco, at least eleven admitted that they accepted detail pay for hours they had not worked.
11. Sacco did not prepare a written report summarizing the findings of his investigation.
12. On November 28, 2018, Sacco asked the president of the patrol officers’ union to gather the thirty patrol officers that he previously interviewed for an off-site meeting at a hotel near MPD headquarters. All thirty officers were gathered in one function-type room. Sacco addressed the room generally and told the officers that he was disappointed in them. Sacco gave a verbal reprimand to all of the officers in attendance.
13. No written record of the verbal reprimand was recorded in any of the patrol officers’ personnel files.
14. Unrecorded verbal reprimands may not be used as grounds for progressive discipline.
15. Sacco did not direct the patrol officers to pay back the unearned detail pay.
16. Sacco did not require any patrol officers be removed from the MPD detail list.
17. Sacco did not issue any verbal or written discipline to

any superior officers in connection with the Construction Site detail allegations.

18. Sacco did not direct any superior officers involved in the Construction Site details to pay back any unearned detail pay.

19. Sacco did not inform the mayor of the Construction Site detail allegations, investigation, admissions of patrol officers or his decision to issue a general verbal reprimand that was not reflected in the officers' personnel files.

20. According to Sacco, he did not inform the mayor because he gave his word to the patrol officers' union president that he [Sacco] would deal with the matter "in house."

21. On November 30, 2018, Sacco retired from the MPD.

22. On December 19, 2018, the mayor appointed Jack Buckley as the new MPD chief.

23. In the spring of 2019, the mayor became aware of the Construction Site detail allegations.

24. An independent investigation of the Construction Site detail allegations performed by Paul L'Italien resulted in a report ("L'Italien Report").

25. The L'Italien Report determined that twenty patrol and five superior MPD officers had submitted requests for pay for detail hours and/or shifts they had not worked at the Construction Site. The falsely claimed detail pay totaled over \$17,000.

26. Of the twenty-five officers who submitted requests for detail hours not worked, four received more than \$1,200.00.

27. Based on the findings of the L'Italien Report, Chief Buckley made a recommendation to the mayor regarding the discipline of each officer. The mayor accepted the chief's recommendations.

28. The discipline ranged from Letters of Reprimand to suspensions depending on the egregiousness of each officer's conduct.

29. Each officer was removed from the detail list for a period ranging from seven days to one year.

30. Each officer was required to return the falsely claimed detail pay.

31. Seventeen officers received suspensions ranging from one to thirty tours of duty.

32. Each superior officer was required to complete a four-hour Leadership Accountability Class on their own time.

33. Two patrol officers were required to sign Last Chance Agreements that provided for termination in the event of further misconduct.

34. On September 6, 2019, Chief Buckley and the Medford city solicitor met individually with twenty-five officers. At the meetings, Chief Buckley provided written notice of the discipline being issued to each officer. The discipline was recorded in each officer's personnel file.

Conclusions of Law

35. As chief of the MPD, Sacco was a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

Sacco violated Section 23(b)(2)(ii)

36. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a municipal employee from knowingly, or with reason to know, using or attempting to use their official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value, and which are not properly available to similarly situated individuals.

37. Avoiding warranted official discipline and retaining unearned detail pay are unwarranted privileges and exemptions.

38. The unwarranted privileges and exemptions were of substantial value because the MPD police officers avoided repayment of unearned detail pay and other official discipline involving loss of pay, both of \$50 or more¹.

39. The unwarranted privileges and exemptions of avoiding official discipline and retaining unearned detail pay were not properly available to similarly situated individuals as no public employee who falsely claims and obtains compensation from their public employer for work they have not performed is entitled to avoid official discipline and retain the falsely claimed and obtained compensation.

40. By, as MPD chief, concealing allegations and admissions of obtaining detail pay through false claims for payment by members of the MPD and failing to appropriately discipline the culpable police officers and require repayment of unearned wages, Sacco knowingly used his official position to secure for the MPD police officers involved in the Construction Site detail false

claims for payment substantially valuable unwarranted privileges and exemptions that were not properly available to similarly situated individuals. In so doing, Sacco violated G. L. c. 268A, § 23(b)(2)(ii).

Sacco Violated Section 23(b)(3)

41. Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from, knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

42. Had Sacco followed established MPD protocol when disciplining the officers involved in the Construction Site detail false claims for payment and/or reported the allegations and admissions of police officer misconduct to the mayor in accordance with Medford City Ordinance 54-34, the officers would have been appropriately officially and substantially disciplined as they were after his retirement. Sacco’s failure as MPD chief to appropriately discipline the officers and require them to return the unearned compensation was not justified and his resolution of the Construction Site detail false claims for payment matter with a general verbal reprimand was unduly lenient and against the public interest. By concealing allegations and admissions of Construction Site detail false claims for payment by MPD police officers from their appointing authority, the mayor, and by failing to discipline those police officers and to require them to repay the unearned detail pay they received, Sacco knowingly acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that the MPD police officers involved in the Construction Site detail false claims for payment could unduly enjoy Sacco’s favor in the performance of his official duties as MPD chief. By so acting, Sacco violated G.L. c. 268A, § 23(b)(3).

Disposition

In view of the foregoing violations of G.L. c. 268A by Sacco, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by Sacco:

- (1) that Sacco pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$9,000 as a civil penalty for violating

G.L. c. 268A, §§ 23(b)(2)(ii) and 23(b)(3); and

- (2) that Sacco waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Disposition Agreement.

DATE: June 2, 2022

¹ Substantial value is \$50 or more. 930 CMR 5.05

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 22-0005**

**IN THE MATTER OF
STACIA CASTRO**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Stacia Castro (“Castro”) enter into this Disposition Agreement pursuant to Section 5 of the Commission’s *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On October 20, 2021, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Castro. The Commission has concluded its inquiry and, on March 17, 2022, found reasonable cause to believe that Castro violated G.L. c. 268A.

The Commission and Castro now agree to the following findings of fact and conclusions of law:

Findings of Fact

- 1. At all relevant times, Castro served as the MassHealth Director of Specialty Provider Network for the Executive Office of Health and Human Services (“EOHHS”).
- 2. At all relevant times, DentaQuest, a dental benefits

management company, was the third-party administrator for MassHealth's Dental Program.

3. In her position as the MassHealth Director of Specialty Provider Network, Castro was responsible for day-to-day interactions with DentaQuest, and regularly interacted with DentaQuest's Regional Director ("Regional Director").

4. In or around June 7, 2016, Castro asked the Regional Director if DentaQuest had access to Red Sox tickets. Soon thereafter, the Regional Director asked DentaQuest's Vice President if she could provide Red Sox tickets to what she referred to as her MassHealth client.

5. DentaQuest provided Castro with four tickets for a July 22, 2016 Red Sox baseball game at Fenway Park, valued at \$120 per ticket. DentaQuest also provided Castro with a tour of Fenway Park and a \$500 voucher for dinner at Fenway Park's EMC Club. DentaQuest did not charge Castro for the tickets, the tour, or the voucher.

6. Castro accepted the four tickets for the July 22, 2016 Red Sox game, Fenway Park tour and EMC Club dinner voucher. Castro did not pay DentaQuest anything for the tickets, the tour, or the voucher.

7. On or about June 29, 2017, Castro asked the Regional Director for six free tickets for a Red Sox game in late August. DentaQuest was unable to accommodate the request.

8. On or about May 9, 2018, Castro again asked the Regional Director for free Red Sox tickets. DentaQuest provided her with four tickets, valued at \$120 per ticket, for a May 25, 2018 Red Sox game. DentaQuest did not charge Castro for the tickets.

9. Castro accepted the four tickets to the May 25, 2018 Red Sox game. Castro did not pay DentaQuest anything for the tickets.

Conclusions of Law

10. Section 23(b)(2)(i) of G.L. c. 268A, in relevant part, prohibits an officer or employee of a state agency from, knowingly, or with reason to know, soliciting or receiving anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position.

11. EOHHS is a state agency as defined by G.L. c. 268A, § 1(p). As the MassHealth Director of Specialty Provider Network for EOHHS, Castro was an employee of a state agency within the meaning of § 23(b)(2)(i) and a state

employee as defined in G.L. c. 268A, § 1(q).

12. In June 2016, Castro solicited and received four free Red Sox tickets from DentaQuest. Castro also received a free tour of Fenway Park and a free \$500 meal voucher, in addition to the tickets.

13. In June 2017, Castro solicited DentaQuest for six additional free Red Sox tickets.

14. In August 2018, Castro solicited and received four free Red Sox tickets from DentaQuest.

15. The free tour and meal voucher Castro received in 2016, each free Red Sox ticket solicited and received in 2016 and 2018, and the six free Red Sox tickets solicited in 2017 were of substantial value.¹

16. Castro's solicitation and receipt of the free Red Sox tickets, tour and meal voucher was not authorized by statute or regulation.

17. When Castro solicited the free Red Sox tickets, and received the free Red Sox tickets, Fenway Park tour and meal voucher from DentaQuest, Castro knew or had reason to know she was being given them because of her official position as EOHHS' MassHealth Director of Specialty Provider Network.

18. Therefore, by receiving a free Fenway Park tour and \$500 meal voucher in 2016, soliciting and receiving four free Red Sox tickets in 2016, soliciting six free Red Sox tickets in 2017, and soliciting and receiving four free Red Sox tickets in 2018, from DentaQuest, Castro knowingly solicited and received something of substantial value for herself, which was not otherwise authorized by statute or regulation, for or because of her official position. In so doing, Castro violated § 23(b)(2)(i).

In view of the foregoing violation of G.L. c. 268A by Castro, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, based on the following terms and conditions agreed to by Castro:

- (1) that Castro pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$6,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2)(i); and
- (2) that Castro waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions

contained in this Agreement.

DATE ISSUED: June 16, 2022

¹ The Commission has established a \$50.00 threshold to determine “substantial value.” 930 CMR 5.05.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**IN THE MATTER OF
KEVIN CLAYTON**

PUBLIC EDUCATION LETTER

July 26, 2022

Kevin Clayton
Via email

Dear Mr. Clayton:

As you know, the State Ethics Commission conducted a preliminary inquiry into whether you, in your capacity as a Massachusetts Environmental Police (“MEP”) Captain, violated the state conflict of interest law by providing a private attorney (the “Attorney”) the opportunity to promote his law practice at an MEP Regional Bureau training. You cooperated fully with the inquiry.

On June 16, 2022, the Commission voted to find reasonable cause to believe that your actions, as described below, violated sections 23(b)(2)(ii) and 23(b)(3) of the conflict of interest law, General Laws chapter 268A, and authorized adjudicatory proceedings. The Commission has determined, however, that the public interest would be best served by, in lieu of adjudicatory proceedings, issuing you this Public Education Letter publicly discussing the facts revealed by the preliminary inquiry and explaining the application of the conflict of interest law to those facts. By resolving this matter through this Public Education Letter, the Commission seeks to ensure that you and public employees in circumstances similar to those described below will have a clearer understanding of the conflict of interest law and how to comply with it.

The Commission and you have agreed that this matter will be resolved publicly with this Public Education Letter and that there will be no formal proceedings against you. You have chosen not to exercise your right to a hearing before the Commission.

The Facts

You have been with the MEP since 1987. You were promoted to Captain/Deputy Chief of Enforcement in 2019. In May 2022, you were promoted to Major. As Captain, you were responsible for holding annual meetings of the South Coastal Regional Bureau and for developing agendas for those meetings.

On November 17, 2020, you hosted a mandatory meeting for all MEP officers in the South Coastal Regional Bureau. Approximately fifteen officers were required to attend the meeting. The officers received their regular rate of pay for attending. The average annual base salary for an MEP officer is \$36,284.66, or approximately \$18.60 per hour.

The November 17, 2020, mandatory meeting was held from 9:30 a.m. to 3:00 p.m. The first item on the meeting agenda was a pre-recorded forty-minute webinar on “police injury” by the Attorney available on one of his law firm’s websites. You played the Attorney’s prerecorded webinar for the audience. During the webinar, the Attorney presented information on injuries police officers might face on the job, signs and symptoms of traumatic brain injuries, and tips on proper documentation of injuries. The prerecorded webinar included approximately ten minutes during which the Attorney answered questions from persons who had viewed the webinar in real time. Following the prerecorded webinar, the Attorney, via videoconference, was available to answer questions from the attending MEP officers. During both the prerecorded webinar and his live appearance, the Attorney discussed his firm’s past cases, settlements, and judgments, and encouraged the webinar attendees to contact his firm. Shortly after the Attorney’s presentation, you sent a text message to him stating, “TY. I think you’re going to receive a few inquiries.”

The Attorney’s law practice primarily represents police officers injured on duty. His firm represents clients on a contingent basis and obtains most of its business through word-of-mouth referrals. You first met the Attorney at a police association conference fifteen to twenty years ago. Subsequently, you became friendly. You attended the Attorney’s wedding and a party celebrating his sons’ graduation from law school. In addition, in 2009-2010, the Attorney represented you in a workplace injury claim before the matter was referred to other counsel.

Legal Discussion

Section 23(b)(2)(ii) of the conflict of interest law, G.L. c. 268A, prohibits a public employee from knowingly or with reason to know using or attempting to use his official position to secure for anyone an unwarranted privilege of

substantial value that is not properly available to similarly situated individuals. Anything worth \$50 or more is of substantial value within the meaning of § 23(b)(2)(ii).

As an MEP Captain, and now Major, you are a public employee subject to the conflict of interest law. As set forth above, you knowingly used your official MEP position to provide a private attorney, who primarily represents injured police officers, with the opportunity to promote his legal practice before a captive audience of about fifteen MEP officers at the South Coastal Regional Bureau meeting on November 17, 2020.

It was a privilege for the Attorney to have the opportunity to provide information about his law firm directly to a captive audience of potential clients. Where the Attorney's firm relies on referrals and represents clients on a contingency basis, he has an obvious private business interest in making police officers, including MEP officers, aware of the services his law practice offers. This privilege was of substantial value because the opportunity to command the attention of fifteen MEP officers and advertise his law firm for over forty minutes of a required regional bureau meeting was worth \$50 or more to the Attorney in that it was likely to generate new business for his law firm (as reflected in your text message to him following his presentation). In addition, the combined public compensation paid to the MEP officers for the time they were required to watch the Attorney's presentation was over \$275.

In addition to being of substantial value, this privilege was unwarranted. Although the Attorney's webinar may have included information relevant to MEP officers, this did not justify providing the Attorney with the opportunity to advertise his firm to a captive audience of potential clients on their publicly paid work time in a public workspace. MEP resources, including MEP officers' public work time, must be used solely to further the public interest. Here, you used your official position to divert those resources to benefit a private business. In addition, some of the "tips" provided to the MEP officers in the webinars were inconsistent with the MEP's interests as a governmental agency. While such information may be appropriate to distribute at private police officers' association meetings, its distribution during a mandatory on-duty training program was not appropriate.

The substantially valuable unwarranted privilege of delivering targeted advertising of a private business to public employees on public work time that you, as MEP Captain, secured for the Attorney was not properly available to any private attorney or other individual similarly situated to the Attorney. In taking the above-described actions, you knew or had reason to know that you were providing the Attorney with a valuable

unwarranted privilege that was not properly available to him.

For the above reasons, the Commission found reasonable cause to believe you violated § 23(b)(2)(ii) of the conflict of interest law.

Section 23(b)(3) of the conflict of interest law prohibits a public employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy the employee's favor in the performance of their official duties, or that the employee is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. By allowing the Attorney to present at the November 17, 2020 South Coastal Bureau meeting, you knowingly or with reason to know acted in a manner that would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that you were improperly influenced in your MEP duties by your association with the Attorney and that he could unduly enjoy your favor in the performance of those official duties. You did not disclose your personal relationship with the Attorney in writing to your appointing authority prior to facilitating his presentation. Accordingly, the Commission found reasonable cause to believe you violated § 23(b)(3) of the conflict of interest law.

Disposition

Based upon its review of this matter, the Commission has determined that the public interest would be best served by the issuance of this Public Education Letter and that your receipt of this letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

This matter is now closed.

Sincerely,

David A. Wilson
Executive Director

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 22-0007**

**IN THE MATTER OF
MELISSA FAY**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Melissa Fay (“Fay”) enter into this Disposition Agreement pursuant to Section 3 of the Commission’s *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On July 30, 2020, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a), into possible violations of the conflict of interest law, G.L. c. 268A by Fay.

On March 17, 2022, the Commission concluded its inquiry and found reasonable cause to believe that Fay violated G.L. c. 268A, §§ 19 and 23(b)(2).

The Commission and Fay now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. Fay was at all relevant times the Director of Student Services for the Wareham Public Schools (“WPS”). She was appointed to the position in 2017 by the Wareham School Committee.

Hiring of her mother

2. As WPS’s Director of Student Services, Fay recommends the hiring of a language translator or interpreter (hereinafter referred to as “translator”) when she determines translation and/or interpretation services are required for school business. WPS’s established procedures require Fay to write a letter to the WPS Superintendent with her recommendation. If the Superintendent approves Fay’s recommendation, the translator then enters into a contract with WPS. Once a translator provides services, Fay reviews and signs the translator’s invoice to acknowledge the services were provided and to verify the availability of sufficient WPS funds to pay the invoice.

3. On eight occasions between 2018 and 2020, Fay, as Director of Student Services, hired her mother to provide translation and/or interpretation services to WPS without seeking or receiving approval from the WPS Superintendent. Apart from Fay’s hiring of her, Fay’s mother did not on any of these eight occasions enter into a contract with WPS to provide the services.

4. On each of those eight occasions, Fay’s mother submitted an invoice for payment by WPS. Fay signed seven of her mother’s invoices as Director of Student Services so that they would be paid by WPS.

5. WPS paid Fay’s mother a total of \$5,975 for her translation and interpretation services.

Hiring of her son

6. As WPS’s Director of Student Services, Fay participated in the hiring process for WPS’s 2019 Extended School Year program.

7. In the hiring process, Fay determined which candidates to interview and made the recommendation to the Superintendent of which candidates should be hired.

8. Under WPS’s established hiring procedures, external candidates would complete a hiring application and be interviewed if they had not previously worked in the school system.

9. Fay’s son was an external candidate for WPS’s 2019 Extended School Year Program. Fay, as Director of Student Services, recommended that the Superintendent hire twenty-five paraprofessionals, including her son.

10. Fay’s son did not submit a WPS employment application until after he was hired and was not interviewed.

11. WPS paid Fay’s son \$1,461.99 for his work for the 2019 Extended School Year program.

Conclusions of Law

Section 19

12. Except as otherwise permitted¹ § 19 of G.L. c. 268A prohibits a municipal employee from participating² as such an employee in a particular matter³ in which, to their knowledge, they or an immediate family member⁴ has a financial interest.⁵

13. As WPS’s Director of Student Services, Fay was, at all relevant times, a municipal employee as defined in G.L. c. 268A, § 1(g).

14. Fay’s son and mother are members of her immediate family, as defined by G.L. c. 268A, § 1(e).

15. Each decision to hire Fay’s mother to provide compensated translation and/or interpretation services to WPS and to sign Fay’s mother’s invoice for payment by WPS were particular matters in which Fay’s mother had a financial interest.

16. When Fay participated as Director of Student Services in the particular matters of her mother’s hiring and compensation as described above, she knew her

mother had a financial interest in the matters.

17. The decision to hire Fay's son for a compensated paraprofessional position in the WPS's 2019 Extended School Year Program was a particular matter in which Fay's son had a financial interest.

18. When Fay participated as Director of Student Services in this particular matter by recommending to the Superintendent her son's hiring along with twenty-four other candidates, Fay knew her son had a financial interest in the matter.

19. Therefore, by, as Director of Student Services, participating in the hiring of her mother to provide compensated translation and/or interpretation services to WPS on eight occasions, signing seven of her mother's invoices, and participating in the hiring of her son as a compensated WPS paraprofessional, Fay repeatedly violated § 19.

Section 23(b)(2)

20. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a public employee from knowingly or with reason to know using, or attempting to use, their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not otherwise properly available to similarly situated individuals.

21. The opportunity to be hired outside of WPS' established hiring procedures is an unwarranted privilege that is not properly available to persons seeking to provide compensated services to WPS.

22. Fay, as Director of Student Services, secured such unwarranted privileges for both her mother and her son by hiring her mother as a compensated translator for WPS without the Superintendent's prior approval and recommending her son's hiring as a compensated WPS paraprofessional without his prior application or interview.

23. These unwarranted privileges were of substantial value because they resulted in Fay's mother and son each receiving from WPS compensation over \$50.⁶

24. Fay knew that she was failing to follow WPS' established hiring procedures each time she hired her mother as a translator for WPS and when she recommended her son's hiring as a WPS paraprofessional.

25. Therefore, by, as the WPS Director of Student Services, securing for both her mother and son the opportunity to be hired outside of WPS' established hiring protocol, Fay knowingly or with reason to know, used her

official position to secure for her mother and son unwarranted privileges of substantial value not properly available to similarly situated individuals. In doing so, Fay violated § 23(b)(2)(ii).

In view of the foregoing violations of G.L. c. 268A by Fay, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by Fay:

- (1) that Fay pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$4,000 as a civil penalty for violating G.L. c. 268A, §§ 19 & 23(b)(2); and
- (2) that Fay waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: July 27, 2022

¹ None of the exemptions applies.

² "Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j).

³ "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

⁴ "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, § 1(e).

⁵ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. *See Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how

small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.

⁶ Substantial value is defined as \$50 or more. 930 CMR 5.05.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 22-0001**

**IN THE MATTER OF
ROBERT O'BRIEN**

Petitioner: Victoria Giuliano, Esq.
Counsel for Petitioner

Respondent: Jeremia Pollard, Esq.
Counsel for Respondent

Commissioners: Maria J. Krokidas, Chair
R. Marc Kantrowitz
Josefina Martinez
Wilbur P. Edwards, Jr.
Eron Hackshaw

Presiding Officer: Josefina Martinez

FINAL ORDER

On July 18, 2021, the parties filed a Joint Motion to Dismiss (“Joint Motion”) with a proposed Disposition Agreement requesting that the Commission approve the Disposition Agreement in settlement of this matter and dismiss the adjudicatory proceeding. The Presiding Officer, Josefina Martinez, referred the Joint Motion, with the Disposition Agreement, to the full Commission for deliberations on July 26, 2022.

In the proposed Disposition Agreement, Respondent Robert O’Brien, former Town of Sandisfield (“Town”) Highway Road Superintendent admits that he violated G.L. c. 268A, §§ 17(a), 19, 20, and 23(b)(2)(ii).

O’Brien admits that he violated § 19 by choosing to have the Town’s Highway Department rent an excavator from P&R Construction (“P&R”), a business of which he was the sole owner, hiring P&R to provide snowplowing and equipment rental services to the Town, and approving,

signing, and submitting pay warrants to the Town for services provided by P&R.¹

O’Brien also admits that he violated G.L. c. 268A, § 23(b)(2)(ii) by using his official position as Highway Road Superintendent to review other bidders’ excavator rental bids prior to submitting P&R’s bid to ensure that P&R submitted the lowest bid and was awarded the contract, to use Town accounts to order materials and services for use by P&R on private jobs, and to obtain an erosion control subcontract for P&R from an asphalt company repairing Town roads on a project that he was monitoring for the Town.²

O’Brien also admits that he violated § 17(a) by P&R’s receipt of compensation from the asphalt company to perform an erosion control contract in connection with the asphalt company’s repair of Town roads.³

O’Brien also admits that he violated § 20 by having a direct or indirect financial interest in contracts between the Highway Department and P&R to rent equipment to the Town.⁴

The Respondent agrees to pay a civil penalty of \$50,000 and to waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the Disposition Agreement in this and any other administrative or judicial proceeding to which the Commission is or may be a party.

In support of the Joint Motion, the parties assert that this matter would be fairly and equitably resolved by the terms set forth in in the Disposition Agreement and that this resolution would obviate the need for a hearing on any factual issues, saving time and resources for all involved. The parties assert that the interests of justice, the parties and the Commission will be served by the Disposition Agreement.

WHEREFORE, the Commission hereby **ALLOWS** the Motion. Respondent’s tendered payment of the \$50,000 civil penalty for violating G.L. c. 268A, §§ 17(a), 19, 20, and 23(b)(2)(ii) is accepted. Commission Adjudicatory Docket No. 22-0001, *In the Matter of Robert O’Brien* is **DISMISSED**.

DATE AUTHORIZED: July 26, 2022

DATE ISSUED: July 27, 2022

¹ G.L. c. 268A, § 19 prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he has a financial interest.

² G.L. c. 268A, § 23(b)(2)(ii) 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 an unwarranted privilege or exemption of substantial value (\$50 or more) that is not properly available to similarly situated individuals.

³ G.L. c. 268A, § 17(a) prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than the municipality in relation to any particular matter in which the same municipality is a party or has a direct and substantial interest.

⁴ G.L. c. 268A, § 20 prohibits a municipal employee from, directly or indirectly, having a financial interest in a contract made by a municipal agency of the same town, in which the town is an interested party, of which financial interest he has knowledge or has reason to know.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 22-0001**

**IN THE MATTER OF
ROBERT O'BRIEN**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Respondent Robert O’Brien enter into this Disposition Agreement pursuant to Section 3 of the Commission’s *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On October 18, 2019, pursuant to G.L. c. 268B § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by O’Brien. On September 15, 2021, the Commission concluded its inquiry and found reasonable cause to believe that O’Brien violated G.L. c. 268A, §§ 17(a), 19, 20, and 23(b)(2)(ii).

The Commission and O’Brien now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. In October 2015, the Town of Sandisfield (“Town”

or “Sandisfield”) was in need of a Highway Road Superintendent.

2. At the time, O’Brien, who was doing business as P&R Construction (“P&R”), was a provider of snowplowing services to Sandisfield. At all relevant times, O’Brien was the sole owner of P&R.

3. On October 26, 2015, O’Brien was appointed by the Sandisfield Board of Selectmen (“Board of Selectmen”) as the Town’s Highway Road Superintendent on an interim basis.

4. O’Brien was appointed by the Board of Selectmen as Sandisfield’s Highway Road Superintendent on a permanent basis on January 25, 2016.

5. O’Brien was at all relevant times the Sandisfield Highway Road Superintendent and a Sandisfield municipal employee.

P&R Snowplowing and Equipment Rental Business with the Town

6. After O’Brien became Highway Road Superintendent, Sandisfield continued to pay P&R for snowplowing services and began paying P&R for equipment rental services.

7. Sandisfield and P&R did not have a contract relating to equipment rental services prior to October 2015.

8. As Highway Road Superintendent, O’Brien decided when to hire P&R for snowplowing and equipment rental services.

9. Between October 26, 2015, and April 30, 2018, O’Brien, as Highway Road Superintendent, decided to hire or otherwise participated in hiring P&R for snowplowing services on over 70 occasions and for equipment on over 20 occasions. P&R was paid a total of approximately \$55,300 by Sandisfield for these services.

Excavator Rentals

10. In May 2017, the Sandisfield Highway Department (“Highway Department” or “Department”) sought to rent an excavator as the Town did not have an operable excavator. Prior thereto, O’Brien began using P&R’s excavator for Town work.

11. O’Brien, as Highway Road Superintendent, solicited quotes for the excavator rental.

12. Three quotes for the excavator rental, each dated May 11, 2017, including one from P&R, were submitted to the

Highway Department.

13. O'Brien submitted P&R's quote after reading the two other bidders' quotes.

14. P&R's quote of \$1,150 per week/\$4,000 per month for the excavator rental, signed by O'Brien as or for P&R, was the lowest of the three quotes.

15. O'Brien, as Highway Road Superintendent, decided that the Highway Department would rent P&R's excavator.

16. Between May 2017, and December 2017, Sandisfield paid P&R approximately \$20,000 for renting the excavator.

O'Brien's Submission of P&R Invoices and Approval of Highway Department Warrants for Payment

17. As Highway Road Superintendent, O'Brien each week approved the Highway Department's weekly warrants for submission to the Board of Selectmen for payment.

18. O'Brien submitted P&R invoices to the Highway Department.

19. After compiling the weekly warrants and accompanying invoices, the Department's secretary gave them to O'Brien for his approval as Highway Road Superintendent.

20. O'Brien, as Highway Road Superintendent, signed each warrant and invoice that included payment to P&R.

21. The Department's secretary then submitted the documents to the Board of Selectmen for payment.

22. Between November 23, 2015, and April 2, 2018, O'Brien approved over 40 Highway Department warrants that included payments to P&R totaling over \$50,000. These Town payments to P&R included approximately \$30,000 for equipment rental services, including rental of an excavator, a paver, and a steel plate, and approximately \$22,000 for snowplowing services.

O'Brien's Work on P&R Paving Jobs

23. On August 28, 2018, and August 29, 2018, O'Brien, acting for or as P&R, paved the driveway of a private residence.

24. On September 7, 2018, O'Brien, acting for or as P&R, paved the driveway of A&M Auto Repair ("A&M"), a private business.

25. O'Brien ordered asphalt for the two P&R private paving jobs in 2018 from Century Aggregates, Inc., and charged the \$1783.33 cost of the asphalt to the Town's account.

26. O'Brien hired Irish Trucking to haul the asphalt for the two P&R private paving jobs in 2018 and told the owner of Irish Trucking to charge the Town for the hauling.

27. On both August 28, 2018, and August 29, 2018, Irish Trucking's driver met O'Brien at the Sandisfield Highway Department garage and O'Brien had the driver follow him to the private home where O'Brien would pave the driveway as or for P&R.

28. On September 7, 2018, Irish Trucking delivered asphalt to A&M, which was used by O'Brien, acting as or for P&R, to pave the private business' driveway.

29. As directed by O'Brien, Irish Trucking billed Sandisfield \$1,657.60 for delivering the asphalt used by O'Brien and P&R to privately pave A&M's driveway.

30. The Irish Trucking invoices were amended to charge P&R Construction for the asphalt deliveries. O'Brien paid Irish Trucking for the asphalt deliveries.

31. O'Brien paid Century Aggregates for the cost of the asphalt purchased for P&R's private jobs. The Town did not pay either the asphalt or hauling invoices.

Erosion Control Subcontract

32. In 2017, the Tennessee Gas Pipeline ("TGP") expanded and caused damage to certain Sandisfield town roads. TGP informally agreed with the Town to repair Cold Spring Road and hired Henkels & McCoy, Inc., ("H&M") to oversee the work. H&M in turn contracted with All State Asphalt, Inc. ("All State") to chip seal Cold Spring Road in 2018.

33. The Town actively observed the progress of the work. O'Brien, as Highway Road Superintendent, was charged by the Town with monitoring the project.

34. In or around summer 2018, O'Brien, as Highway Road Superintendent, met with All State representative, Huck House, to discuss the Cold Spring Road repair. At the end of the meeting, House told O'Brien that All State would have to subcontract the erosion control work for the project. O'Brien responded that P&R could do the work.

35. A P&R proposal for the erosion control work was submitted to All State on August 13, 2018.

36. A written contract between P&R and All State was signed on September 13, 2018. Under the contract, All State was to pay P&R \$16,000 to install 2,200 linear feet of wattles (straw-filled synthetic sacks used for erosion control) on Cold Spring Road.

37. A P&R invoice, dated September 20, 2018, was submitted to All State in the amount of \$16,000 for P&R's labor in performing the erosion control work on Cold Spring Road.

Conclusions of Law

38. As Sandisfield's interim and permanent Highway Road Superintendent, O'Brien was a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

Section 19 Violations

39. General Laws chapter 268A, § 19 prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he has a financial interest.

Excavator Rentals from P&R

40. The Highway Department's decision to rent an excavator in and after May 2017, was a particular matter.

41. O'Brien participated as Highway Road Superintendent in the excavator rental particular matter by soliciting and reviewing all three excavator rental quotes, each dated May 11, 2017, including the low bid quote submitted by P&R, and then choosing to have the Highway Department rent from P&R.

42. O'Brien knew at the time he participated that he had a financial interest in the particular matter of the excavator rental because he intended to submit and did submit a bid on behalf of his private business, P&R, for the excavator rental.

43. Therefore, when O'Brien as Highway Road Superintendent chose to have the Highway Department rent an excavator from P&R in May 2017 and thereafter, O'Brien participated as a municipal employee in a particular matter in which to his knowledge he had a financial interest. Each time he did so, O'Brien violated G.L. c. 268A, § 19.

Decisions to Hire P&R

44. Each of the decisions O'Brien made to hire and authorize payment to P&R for snowplowing and/or equipment rental services between October 26, 2015, and April 30, 2018, were particular matters.

45. O'Brien knew he had a financial interest in each of these particular matters because he was the owner of, and did business as, P&R.

46. As Highway Road Superintendent, O'Brien participated in each of these particular matters by repeatedly hiring P&R for snowplowing and equipment rental services.

47. Therefore, by as Highway Road Superintendent, repeatedly authorizing and approving the hiring of P&R to provide snowplowing and equipment rental services to the Town, O'Brien repeatedly participated as a municipal employee in particular matters in which to his knowledge he had a financial interest. Each time he did so, O'Brien violated G.L. c. 268A, § 19.

Approving Warrants for Payments to P&R for Submission to BOS

48. Each of the decisions O'Brien made between November 23, 2015, and April 2, 2018, to approve, as Highway Road Superintendent, warrants for payments to P&R for submission to the Board of Selectmen was a particular matter.

49. O'Brien knew he had a financial interest in each decision to approve payments to P&R.

50. O'Brien, as Highway Road Superintendent, participated in the particular matters by signing the warrants and invoices listing payments to P&R.

51. Therefore, by as Highway Road Superintendent repeatedly approving, signing, and submitting pay warrants to the Town, for services provided by P&R, O'Brien repeatedly participated as a municipal employee in particular matters in which to his knowledge he had a financial interest. Each time he did so, O'Brien violated G.L. c. 268A, § 19.

Section 23(b)(2)(ii) Violations

52. General Laws chapter 268A, § 23(b)(2)(ii) prohibits a public employee from knowingly, or with reason to know, using his official position to secure for himself or others an unwarranted privilege of substantial value that is not properly available to similarly situated individuals.

Excavator Bids and Contract

53. O'Brien, as a public employee, knowingly or with reason to know solicited and/or reviewed excavator rental bids in May 2017 when he intended to submit a bid for an excavator rental for his private business, P&R.

54. The opportunity to participate in soliciting and/or reviewing competing excavator rental bids prior to submitting a bid for his private business, was an unwarranted privilege.

55. The unwarranted privilege was of substantial value because it allowed O'Brien to ensure that P&R submitted the lowest bid and was awarded the contract which paid \$1,150 per week and/or \$4,000 per month to P&R.

56. The unwarranted privilege was not available to similarly situated individuals.

57. O'Brien used his position as Highway Road Superintendent secure an unwarranted privilege, namely, the excavator rental contract.

58. Therefore, by, as Highway Road Superintendent, reviewing other bidders' excavator rental bids prior to submitting P&R's bid, O'Brien knowingly or with reason to know used his official position to ensure P&R was awarded the excavator rental contract, which was an unwarranted privilege of substantial value, not available to similarly situated individuals. In so doing, O'Brien violated G.L. c. 268A, § 23(b)(2)(ii).

Private P&R Purchases Charged to the Town

59. In or about August 2018, and September 2018, O'Brien, as Highway Road Superintendent, knowingly or with reason to know charged or attempted to charge the Town for materials and services, including asphalt and trucking delivery services to be used in P&R's private jobs.

60. The ability to charge the cost of asphalt and trucking delivery services for P&R's private jobs to the Town's account was an unwarranted privilege.

61. The unwarranted privilege was of substantial value.

62. The unwarranted privilege was not properly available to similarly situated individuals.

63. Therefore, by repeatedly using his position as Highway Road Superintendent to use Town accounts to order materials and services for use by P&R on its private jobs, O'Brien knowingly or with reason to know used or attempted to use his official position to secure for himself and/or P&R an unwarranted privilege of substantial value, not properly available to similarly situated individuals. Each time he did so, O'Brien violated G.L. c. 268A, § 23(b)(2)(ii).

Soliciting Erosion Control Subcontract

64. O'Brien, as Highway Road Superintendent, solicited an erosion control subcontract for his private company from All State when he met with All State regarding the Cold Spring Road project in or around the Summer of 2018.

65. Soliciting and obtaining a private job for one's private company while acting in one's public capacity is an unwarranted privilege.

66. The unwarranted privilege was of substantial value as the erosion control subcontract was worth \$16,000.

67. The unwarranted privilege was not available to similarly situated individuals.

68. Therefore, O'Brien used his position as Highway Road Superintendent to obtain an erosion control subcontract for P&R on the Cold Spring Road project, thereby knowingly or with reason to know using his official position to secure for himself and/or others an unwarranted privilege of substantial value not properly available to similarly situated individuals. In so doing, O'Brien violated G.L. c. 268A, § 23(b)(2)(ii).

Section 17(a) Violation

69. General Laws chapter 268A, § 17(a) prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than the municipality in relation to any particular matter in which the same municipality is a party or has a direct and substantial interest.

70. As the sole owner of P&R, O'Brien directly or indirectly received compensation from All State to perform the erosion control subcontract on the Cold Spring Road project in 2018.

71. Sandisfield's decision to allow TGP to repair Cold Spring Road was a particular matter.

72. The matter was of direct and substantial interest to the Town, as the Town is responsible for maintaining the road.

73. Receiving compensation from All State to perform the erosion control subcontract for the Cold Spring Road project was otherwise than as provided by law for the proper discharge of O'Brien's official duties as Highway Road Superintendent.

74. Therefore, by receiving compensation from All State in relation to P&R's completion of the erosion control subcontract on the Cold Spring Road project, O'Brien

otherwise than as provided by law for the proper discharge of official duties directly or indirectly received compensation from someone other than the Town in relation to a particular matter in which the same Town is a party or has a direct and substantial interest. In so doing, O'Brien violated G.L. c. 268A, § 17(a).

Section 20 Violations

75. General Laws chapter 268A § 20 prohibits a municipal employee from, directly or indirectly, having a financial interest in a contract made by a municipal agency of the same town, in which the town is an interested party, of which financial interest he has knowledge or has reason to know.

76. Each equipment rental to Sandisfield by P&R between October 26, 2015, and April 30, 2018, was a contract made by a Sandisfield municipal agency, the Highway Department, in which the Town was an interested party.

77. As the sole owner of P&R, O'Brien had a financial interest in these contracts of which he had knowledge.

78. Therefore, by while Sandisfield Highway Road Superintendent, repeatedly renting equipment to the Town through his business P&R, O'Brien knowingly repeatedly had a direct or indirect financial interest in contracts made by a municipal agency of the Town, in which the Town was an interested party. Each time he did so, O'Brien violated G.L. c. 268A § 20.

Disposition

In view of the foregoing violations of G.L. c. 268A by O'Brien, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by O'Brien:

- (1) that O'Brien pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$50,000 as a civil penalty for violating G.L. c. 268A, §§ 17(a), 19, 20, and 23(b)(2)(ii); and
- (2) that O'Brien waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Disposition Agreement.

DATE ISSUED: July 28, 2022

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NOS. 20-0003
20-0004
20-0005
20-0006**

**IN THE MATTER OF
SUSAN ANDERSON,
JOSEPH D. EARLY, JR.,
RICHARD MCKEON,
and
JEFFREY TRAVERS**

Appearances: Timothy M. Burke, Esq. for Respondent Susan Anderson

Thomas R. Kiley, Esq. & Meredith G. Fierro, Esq. for Respondent Joseph D. Early, Jr.

Michael S. Rusconi, Esq. for Respondent Richard McKeon

Roy A. Bourgeois, Esq. for Respondent Jeffrey Travers

Candies Pruitt, Esq., Tracy Morong, Esq. & John McDonald, Esq. for Petitioner

Commissioners: Maria J. Krokidas, Ch. R. Marc Kantrowitz Josefina Martinez Wilbur P. Edwards, Jr. Eron Hackshaw

Presiding Officer: Commissioner R. Marc Kantrowitz

FINAL DECISION AND ORDER

I. INTRODUCTION

This consolidated matter arises from an arrest report prepared by a Massachusetts State Police ("MSP") Trooper relating to his October 16, 2017 arrest of Alli Bibaud ("Bibaud"), the daughter of Massachusetts Judge Timothy Bibaud ("Judge Bibaud"). At all times

relevant to the allegations, Respondents held the following positions: Susan Anderson ("Anderson") was an MSP Major and Commander of C Troop; Joseph D. Early, Jr. ("Early") was the District Attorney for the Middle District, also known as the Worcester County District Attorney, and the chief law officer in the Middle District; Richard McKeon ("McKeon") was the MSP Colonel and Superintendent; and Jeffrey Travers ("Travers") was the Senior First Assistant District Attorney ("Senior First Assistant") for the Worcester County District Attorney's Office.

Petitioner alleges each Respondent violated G.L. c. 268A, § 23(b)(2)(ii) by using their official positions in various ways to have Bibaud's arrest report revised to remove embarrassing statements including sexually explicit statements attributed to her, as well as a statement that her father was a judge, and/or attempting to have the report replaced in the court's file with a revised report which would avoid embarrassment, harm to reputation, and the cost to Judge Bibaud and/or his daughter to rehabilitate their reputations.

Petitioner further alleges that in doing so, each Respondent violated G.L. c. 268A, § 23(b)(3) by acting in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that they were likely to act as a result of Judge Bibaud's rank, position or undue influence, and additionally, in the case of Anderson, that any person could improperly influence her or enjoy her favor in the performance of her official duties.

II. PROCEDURAL HISTORY

On June 24, 2020, Petitioner initiated these proceedings by filing an Order to Show Cause ("OTSC") against Anderson, Early, McKeon, and Travers. Each Respondent filed an Answer denying any violations and asserted affirmative defenses. These matters were consolidated pursuant to 930 CMR 1.01(6)(f) by order of the Presiding Officer dated August 31, 2020. Respondents thereafter filed numerous dispositive motions,^{1/} all of which were referred by the Presiding Officer to the Commission. The Commission denied each dispositive motion after a full review thereof, including oral argument.

An adjudicatory hearing was held in-person before the Presiding Officer and remotely via videoconference on April 13-15, April 20-22, and 27-29, 2022. All parties were represented by counsel. A total of thirteen witnesses, four of whom were Respondents, testified at the hearing. Sixty-three exhibits were admitted into

evidence. Closing arguments were made before the Presiding Officer on April 29, 2022.^{2/} All parties subsequently filed post-hearing briefs.

In rendering this Final Decision and Order, each undersigned member of the Commission has considered the testimony of the witnesses at the adjudicatory hearing, the evidence in the record, and the arguments of the parties.

III. FINDINGS OF FACT

At all times relevant to the allegations, Anderson, Early, McKeon, and Travers were state employees subject to the conflict of interest law. On October 16, 2017, Ryan Sceviour ("Sceviour"), an MSP Trooper, arrested Bibaud and subsequently prepared an arrest report^{3/} which contained embarrassing statements including sexually explicit statements attributed to Bibaud, as well as a statement that her father was a judge, referred to herein collectively for convenience as the "Statements."^{4/}

After his draft arrest report was approved by an MSP Sergeant, Sceviour printed out the complaint application with the arrest report narrative attached,^{5/} in accordance with the practice of the MSP, made copies of the arrest report as well as other documents, and put together the arrest packet for submission to the Worcester District Court by the MSP court officer. On October 17, 2017, a clerk-magistrate found probable cause to issue a criminal complaint against Bibaud for operating under the influence of ("OUI") drugs and OUI liquor.

On October 17, an attorney, who had made a limited appearance on behalf of Bibaud, filed a motion under the Uniform Rules on Impoundment Procedure seeking to impound the MSP incident report [arrest report] and statement of facts on the grounds that "the defendant's right to a fair trial would be at risk from prejudicial pretrial publicity should those records not be impounded." The Assistant District Attorney present at the hearing took no position on the motion. The motion was allowed by the court until the next court date scheduled for October 30, and was served on the MSP for its keeper of the records.

Travers was notified of Bibaud's arrest by a text message from an Assistant District Attorney at approximately 7:23 a.m. on October 17. As part of his responsibilities as Senior First Assistant, all cases identified as a potential conflict for the office were referred to Travers for evaluation as to whether there

was a conflict and how the office would respond. Bibaud's case involved a possible appearance of a conflict because she and Judge Bibaud had worked in the District Attorney's Office. Travers previously was involved with the assignment of a special prosecutor to handle Bibaud's case involving her May 2017 arrest for drug possession.

Travers sent a text message at approximately 7:51 a.m. on October 17 to Early notifying him that Bibaud had been arrested for OUI the night before. Later that day, after receiving Bibaud's file, which included a copy of the endorsed motion to impound, Travers made a copy of the arrest report and left it for Early. Travers subsequently discussed it with Early and informed him that the report with the Statements had been impounded. On that same day, after discussion with Travers, Early decided to refer the case to another District Attorney's Office for prosecution because he wanted the public to believe that no one was getting any "partial" treatment.⁶⁷

Early has known Judge Bibaud since the 1990s. Prior to Early's election, they sometimes ran in the same circles socially and Early had attended a Cape Cod golfing trip in the early 1990's organized by Judge Bibaud.

The Bibauds previously had worked in the Worcester County District Attorney's Office under Early. Alli Bibaud was a Victim Witness Advocate from 2010 to 2013. Prior to assuming the bench, Judge Bibaud was an Assistant District Attorney under Early's predecessor and then under Early. After Early was elected as District Attorney in November 2006, he passed over then Assistant District Attorney Bibaud and hired someone else as his First Assistant. As a result of this and Alli Bibaud's departure from the office, many years later in October 2017, Early and Judge Bibaud's relationship was "friendly, polite, courteous" in public, but otherwise, it was "very strained" and "poor."

Travers also worked in the District Attorney's Office at the same time as the Bibauds. Travers and then Assistant District Attorney Bibaud worked in different areas of the office and neither supervised the other. Travers worked in a different building from Alli Bibaud and did not have any cases with her, although she did provide him with translation assistance on one occasion. Travers did not socialize or have any personal relationship with either Judge Bibaud or his daughter.

On the day he learned of Bibaud's arrest, Early called McKeon about the arrest report. McKeon had previously been appointed by Early and served under him as the Unit Commander of the State Police Detectives Unit ("CPAC") in the Worcester County District Attorney's Office. Early and McKeon were good friends who had traveled together twice to Florida. McKeon had a great deal of respect for Early.

McKeon knew Judge Bibaud from when he was assigned to the Worcester CPAC. McKeon has not spoken to Judge Bibaud in twenty years and has no personal or familial relationship with him. McKeon has never met Alli Bibaud.

Early thought "the judges were going to be kind of mad over this," "were pretty upset about this and the language in the report," and "were going to be a little bit upset the way that one of their judges' daughters had been handled." He "didn't know if they were going to place the blame on [him] for the report, [or] the [MSP]," and he wanted to "[t]ry and keep good relations."

Early and McKeon spoke multiple times by phone between October 17 through October 19. The first time they spoke was October 17 when Early called McKeon and asked him if he had heard about Bibaud's arrest and had seen the arrest report. Early asked, "how about that report" to which McKeon replied, "what report."⁷⁷ Early told McKeon about Bibaud's arrest and they discussed, among other things, a statement in the arrest report as to how Bibaud had procured the drugs, which had made Early's "head explod[e]."

With regard to the arrest report, Early said to McKeon, "words to the effect of are you doing anything about it," which McKeon understood to be asking him what he was going to do about the statement in the arrest report that had made Early's head explode. McKeon told Early he could not do anything about the arrest report because "that ship had sailed," meaning it had already been filed with the court and a criminal complaint had been issued against Bibaud. Early told McKeon that he "did not think it was too late to do something." He also told McKeon that he was going to file a motion to redact.

McKeon viewed Early's call as a complaint from a District Attorney which he felt was something he should take notice of and look into. He did not typically get calls from a District Attorney complaining about a report. Neither McKeon in his capacity as Colonel nor Early recalled ever having another conversation with

each other about the arrest report of a specific arrestee.

On October 19, McKeon called Early to tell him that a new report was coming down. Early responded, "Good for you, Rick. I thought you had to do something." Early called Travers to inform him that the MSP were going to be delivering a new report in the Bibaud matter.

On October 19, McKeon issued an order through the chain of command at the MSP, which is the oldest extant paramilitary police organization in the country, requiring Sceviour who was off duty at home to return to work to redact two sentences containing Bibaud's quoted statements from the arrest report. McKeon also indicated he wanted observation reports^{8/} issued to both Sceviour and the MSP Sergeant who approved the arrest report. Sceviour traveled that day from his home to the Holden Barracks where he was issued the observation report and met with Anderson.

Anderson was on vacation at the time Bibaud was arrested. She received a text informing her of the arrest, but did not respond or take any action regarding Bibaud until she received the order from McKeon through the MPS chain of command on October 19. Anderson had never met either Judge Bibaud or Bibaud.

During Sceviour's meeting with Anderson on October 19, she provided him with the information he was supposed to redact from the arrest report. Sceviour made statements to Anderson that "it wasn't fair and he didn't think it was right" and "[i]f it wasn't who she was, [the daughter of a judge,] it wouldn't be happening." Anderson agreed with him. If she had failed to comply with the order, Anderson would have been disciplined.

As ordered, Sceviour revised the arrest report, the second page of which included a statement "REVISED ON OCTOBER 19, 2017."^{9/} Later that day, he delivered the revised report to the Worcester District Attorney's Office where Travers received it. Sceviour's overtime pay for October 19 exceeded \$50.

The next day, October 20, Early called Chief Justice Dawley and they discussed a motion to redact. The Chief Justice told him such a motion would have to be filed with the clerk and heard in open court on the record by a judge. During the week of October 17, Early had discussed redaction with his own attorney and was looking at the possibility of redaction.

At some point on October 20, Early called Travers and

told him to go to the Worcester District Court Clerk's Office to see what's going on with Bibaud's case. After receiving Early's call, Travers opened the sealed envelope from the MSP he had received the day before which contained the revised report and took it with him when he went to the Clerk's Office and spoke to Acting Clerk Magistrate, Brendan Keenan ("Keenan") in Keenan's office. Travers and Keenan discussed the arrest report and Travers let Keenan know he had received a revised report from the MSP. Travers did not show or provide a copy of the revised report to Keenan.

Instead of filing a motion to redact, Travers asked Keenan either if he could "accept" the revised report or whether he could "offer" it to him. When Keenan was first asked what Travers wanted to do, Keenan testified: "To have - he had a report, I believe, I'm not sure, that he wanted to replace with the report that I had." Keenan further testified similarly that "I thought he wanted me to just take it and swap it."^{10/}

Keenan told Travers that he could not accept the revised report because the statement Keenan had was the one on which probable cause was found and it was the record of the proceeding. Keenan suggested to Travers that Travers could move to redact the original report which, after thinking about it for a minute, Travers told Keenan that it "sounded like a good idea." Keenan then went upstairs in the courthouse to speak to Judge David Despotopulos ("Judge Despotopulos").

Judge Despotopulos was speaking with Early when Keenan arrived. Keenan told Judge Despotopulos "Your Honor, ADA Travers is down in my office, and he wanted to change a report." Keenan further testified he told the Judge and Early that we or he couldn't do that. Early responded, "Oh, you can't do that."^{11/} After Early left, Keenan then went out to bring Travers into the judge's lobby, and Travers asked the Judge if he would enter an oral motion to redact. Thereafter, Keenan and Travers returned to Keenan's office.

Upon returning to his office, Keenan made a copy of the original report which was impounded and gave it to Travers along with a black marker. Travers then marked off portions of the Statements. Later that same day, October 20, Travers made an oral motion to redact before Judge Despotopulos stating that the redactions were "appropriate, given the Commonwealth's ethical obligation to avoid unnecessary pretrial publicity which would be prejudicial to the defendant," were "extraneous to anything applied to the finding of probable cause, and "purely prejudicial potentially" to Bibaud.^{12/} The court allowed that motion and lifted the

motion to impound. The original unredacted report remained in the file, sealed. Early was unaware Travers had moved to redact until after the fact.

Bibaud's case was transferred to the Framingham District Court in Middlesex County on October 23. Travers sent the original police report, the revised report delivered by Sceviour (but not filed with the court), and the original unredacted probable cause statement (with a note indicating he had made redactions to it) to the special prosecutor in Middlesex. There was never a change to any of the charges initially brought against Bibaud. The Statements were made public in violation of the impoundment order on or about October 26 by an online blogger who had obtained a copy of Bibaud's original arrest report. Other media reports followed.

IV. THE ALLEGATIONS

Petitioner alleges that the following conduct by each Respondent violated both § 23(b)(2)(ii) and § 23(b)(3).

As to Early, Petitioner alleges in the OTSC against him that as District Attorney, he advised McKeon that McKeon could revise the arrest report to remove the Statements and directed Travers to go to the Worcester District Court Clerk's Office and replace the original report in the court's files with the revised arrest report. Petitioner alleges that in doing so, Early violated § 23(b)(2)(ii) by using his official position to secure for Judge Bibaud and/or his daughter the unwarranted privilege of having the arrest report revised or replaced, which was of substantial value and which was not properly available to similarly situated individuals. It further alleges that in doing so, Early violated § 23(b)(3) by knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances to conclude that he was likely to act or fail to act as a result of rank, position or undue influence of any party or person.

As to McKeon, Petitioner alleges in the OTSC against him that as the MSP Colonel, he issued an order through the chain of command that Sceviour remove the Statements from the arrest report. Petitioner alleges that in doing so, McKeon violated § 23(b)(2)(ii) by using his official position to secure for Judge Bibaud and/or his daughter, the unwarranted privilege of having the arrest report revised, which was of substantial value and which was not properly available to similarly situated individuals. It further alleges that in doing so, McKeon violated § 23(b)(3) by knowingly,

or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that he was likely to act or fail to act as a result of rank, position or undue influence of any party or person.

As to Anderson, Petitioner alleges in the OTSC against her that as an MSP Major and Troop Commander, she and a member of her command staff decided that the Statements would be removed from the arrest report and then ordered Sceviour to remove them. Petitioner alleges that in doing so, Anderson violated § 23(b)(2)(ii) by using her official position to secure for Judge Bibaud and/or his daughter, the unwarranted privilege of having the arrest report revised to remove the Statements, which was of substantial value and which was not properly available to similarly situated individuals. It further alleges that in doing so, Anderson violated § 23(b)(3) by knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that she was likely to act or fail to act as a result of rank, position or undue influence of any party or person or that any person can improperly influence her or enjoy her favor in the performance of her official duties.

Finally, as to Travers, Petitioner alleges in the OTSC against him that as Senior First Assistant, he went to the Worcester District Court Clerk's Office and attempted to replace the original arrest report in the court's file with the sanitized, revised report. Petitioner alleges that by doing so, Travers violated § 23(b)(2)(ii) by using his official position to attempt to secure for Judge Bibaud and/or his daughter, an unwarranted privilege of having the original arrest report in the court's file replaced with the sanitized, revised report which was of substantial value and which was not properly available to similarly situated individuals. It further alleges that in doing so, Travers violated § 23(b)(3) by knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that he was likely to act or fail to act as a result of rank, position or undue influence of any party or person.

V. DECISION

Petitioner must prove its case and every element of the alleged violations against each Respondent by a preponderance of the evidence. 930 CMR 1.01(10)(o)(2). The weight to be attached to any evidence in the record, including evidence concerning the credibility of witnesses, rests within the sound

discretion of the Commission. 930 CMR 1.01(10)(n)3. In deciding these cases, the Commission must decide every issue of fact or law necessary to its Final Decision. 930 CMR 1.01(10)(o)(3).

A. The G.L. c. 268A, § 23(b)(2)(ii) Claims

G.L. c. 268A, § 23(b)(2)(ii) provides in relevant part that no state employee "shall knowingly, or with reason to know: use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges ... which are of substantial value and which are not properly available to similarly situated individuals." In order to conclude that a Respondent has violated § 23(b)(2)(ii), Petitioner must prove by a preponderance of the evidence that the Respondent knowingly, or with reason to know: (1) used or attempted to use their official position; (2) to secure an unwarranted privilege for Judge Bibaud and/or his daughter; (3) which was of substantial value; and (4) which was not properly available to similarly situated individuals. If Petitioner failed to meet its burden as to any one element, the § 23(b)(2)(ii) claim cannot stand.

After a thorough and careful review of this case,^{13/} including consideration of the elements set forth above, for the reasons set forth below, we find that Petitioner has failed to meet its burden to prove the substantial value element of its § 23(b)(2)(ii) allegation against each Respondent. As this determination is dispositive of the claims, we do not address or make any findings as to any other element of the § 23(b)(2)(ii) allegations.

By its express terms, a § 23(b)(2)(ii) violation requires the unwarranted privilege be of "substantial value." Substantial value is not defined in the conflict of interest law. The meaning of that phrase was determined by the Commission to be a value of \$50 or more. *EC-COI-94-4* citing *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-06-04* ("Anything with a value of \$50 or more is of substantial value for G.L. c. 268A purposes."). A definition of substantial value was subsequently codified in the Commission's regulations at 930 CMR 5.05, effective December 10, 2010.^{14/}

Petitioner argues that substantial value exists in three ways: removal of the Statements from the arrest report would avoid embarrassment and harm to reputation for Judge Bibaud and/or his daughter and provide them with peace of mind (i.e., intangible benefits); the cost to Judge Bibaud and/his daughter to rehabilitate their reputations; and the cost of the collective time of the

state employees involved in revising the arrest report to remove the Statements. These theories include both monetary components - the cost to rehabilitate one's reputation and the cost of the collective time of the state employees - as well as non-monetary components - embarrassment, harm to reputation, and peace of mind.

As an initial matter, the Statements had been impounded at the request of Bibaud's counsel on October 17, 2017, and were to remain impounded until at least the next court date on October 30, 2017. The allowance of the impoundment motion was served on the MSP for its keeper of the records. As a result, at the time the Respondents took the actions alleged, the Statements were not public. Thus, absent a violation of the court order, there was no risk of embarrassment, harm to reputation, cost to rehabilitate reputations or concern about peace of mind for either Judge Bibaud and/or his daughter. Further, Bibaud or her attorney could have filed a motion to extend the order of impoundment beyond October 30 or, in the alternative, filed a motion to redact as was ultimately done by Travers.

As to the alleged monetary cost to rehabilitate their reputations, there is no evidence in the record that either Bibaud or Judge Bibaud incurred or even contemplated incurring any costs to rehabilitate their reputations online or otherwise. Petitioner's expert witness,^{15/} Jon Goldberg, testified about a phenomenon called the "Streisand effect" which is when efforts to try and change the information that is out there blows back and makes it much worse. It is equally likely that if and when the Statements became public, Alli Bibaud and Judge Bibaud would have chosen to do nothing so as to avoid this phenomenon.

Compounding the lack of evidence on this issue is Goldberg's testimony that he could not opine as to the cost to either Bibaud to repair their reputation absent a release to the public.^{16/} He opined:

I could not - I could not look in isolation at an arrest report and say if this got out there, this is what it would require to rehabilitate the arrestee's reputation, because from just a police report, I can opine on what might occur, but until news outlets and reporters and other parties, bloggers, et cetera, do something with it, it has not had a material impact on reputation, you know, or as I said, in the - you know, if the report itself somehow were to be findable online. But just based on a police report or an arrest report, I can't quantify that damage

until that damage is done. And until I quantify that damage, I can't speculate on how many months and how many thousands of dollars it would take to address it.

Moreover, in this case, the very event Respondents allegedly sought to prevent - the release of the Statements - in fact, did occur. Despite the occurrence of this event, there is an absence of evidence in the record as to whether Bibaud or Judge Bibaud actually incurred any monetary cost to rehabilitate their reputations in the face of the leak.^{17/}

As to the alleged monetary cost of the cumulative time spent by Respondents and other state employees to revise the arrest report, Sceviour's overtime pay for October 19 exceeded \$50. Petitioner further asserts that based on their 2017 salaries, it is reasonable to infer that the time Anderson, McKean, Early, and Travers each spent on the arrest report, was also of substantial value.

In some previous cases, substantial value has been measured by the cost to the state when the use of an official position involved private gain to the state employee. For example, *In the Matter of Michael Fredrickson*, 2003 SEC 1156 (Disposition Agreement), the Board of Bar Overseers ("BBO") General Counsel was found to have violated § 23(b)(2) by using his BBO office, work time, equipment, and subordinate's time to prepare novels for publication. The "value of the time, help and state resources that Fredrickson obtained was worth well over \$50, and therefore, of substantial value." *Fredrickson* involved the use of state resources for his personal gain, including avoiding the cost he would have otherwise incurred had he expended his personal resources to prepare his novels for publication. In contrast to *Fredrickson*, there is no evidence in the record as to any personal gain of a monetary nature for any Respondent or either Bibaud. Thus, we decline to use the cost of the cumulative state time as a measure of substantial value in this case.

Finally, in the Commission's cases decided under § 23(b)(2)(ii) and its predecessor, § 23(b)(2), generally something of quantifiable monetary value was used to establish substantial value. *See, e.g., In the Matter of Howard Hansen*, 2017 SEC 2604 (amounts invoiced and approved well exceeded \$50 and in aggregate exceeded \$13,000). The Commission, however, has recognized the concept that a non-quantifiable or non-monetary value, referred to as both "substantial intangible value" and "intangible substantial value,"

under appropriate circumstances may be sufficient to establish substantial value for purposes of § 23(b)(2)(ii). *See, e.g., In the Matter of Marjorie Malone*, 2012 SEC 2410 (Disposition Agreement) (satisfaction obtained by assistant assessor when retaliating against town officials by improperly raising their property assessments at a time when town was taking employment-related action against her was "an intangible, non-quantifiable benefit" worth \$50 or more).

Many of the cases recognizing the concept of intangible value have included evidence or findings of fact of an actual or potential quantifiable monetary component. *See, e.g., In the Matter of Joseph Turner*, 2011 SEC 2370 (unwarranted privilege municipal employee provided to parents by allowing them to purchase cemetery plots pre-need was of substantial value both by gaining peace of mind knowing where they would be buried and avoidance of a \$440 price increase and any subsequent price increases); *In the Matter of Raymund Rogers*, 2002 SEC 1060 (Public Enforcement Letter) (supervising police officer's ability to have subordinate provide private transportation services for his family members was of significant value both monetarily, because it exceeded \$50 in taxi cab costs and intangibly, because it provided family with on-call private transportation service); *In the Matter of Jeffrey Fournier*, 2021 SEC ____ (unwarranted privilege of state employee's advantageous access to decision-makers at the Department of Children and Families and the Office of the Child Advocate to promote a private business was of substantial value because it enhanced his chances of obtaining potential business).

As to the intangible benefits alleged by Petitioner to constitute substantial value, there is no substantial evidence in the record as to whether Bibaud and/or Judge Bibaud had any concerns about embarrassment, harm to reputation or peace of mind regarding the Statements, particularly in light of the fact that Bibaud had been arrested twice in a little over a five-month period for drug related matters. As a result, in this case, Petitioner has failed to meet its burden to prove that the alleged intangible components are sufficient to satisfy substantial value. Petitioner's failure to meet its burden here, however, does not preclude us from deciding in a future case with substantial evidence that an intangible such as reputation may constitute substantial value for purposes of a § 23(b)(2)(ii) claim.^{18/}

Finally, despite the fact that Early discussed redaction with Chief Justice Dawley, McKeon, and even his own

attorney, he filed no such motion and did not instruct Travers to do so. In fact, he was not aware that Travers had moved to redact until after Travers had done so. Although we have reached our determination as to the failure of proof on the substantial value element, thus defeating the § 23(b)(2)(ii) claims, we take this opportunity to note that to the extent there were any concerns about protecting Bibaud from prejudicial pretrial publicity in order to preserve her constitutional right to a fair trial, the better practice would have been to do so through judicial action by filing a motion to redact to avoid the specter of special or favorable treatment raised by this case.

B. The G.L. c. 268A, § 23(b)(3) Claims

G.L. c. 268A, § 23(b)(3) provides, in relevant part, that a state employee shall not "knowingly, or with reason to know: act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of ... rank, position or undue influence of any party or person." (emphasis added). The OTSC for Anderson includes both prongs of § 23(b)(3) whereas each OTSC for Early, McKeon, and Travers, includes only the prong of "likely to act or fail to act as a result of ... rank, position or undue influence of any party or person."

The purpose of the conflict of interest law "was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing." *Scaccia v. State Ethics Commission*, 431 Mass 351, 359 (2000) (by accepting golf outings and dinners from various lobbyists whose clients had an interest in matters before him, Scaccia acted in a manner which would cause a reasonable person to conclude that he could be improperly influenced by the lobbyists in the performance of his official duties) quoting *Board of Selectmen of Avon v. Linder*, 352 Mass. 581, 583 (1967). Section 23(b)(3) is "concerned with the appearance of a conflict of interest as viewed by the reasonable person" and not whether preferential treatment was given. *In the Matter of Raymond Hebert*, 1996 SEC 800, 810. As the Commission noted in *Hebert*, in adopting this standard of conduct, the Legislature "focused on the perceptions of the citizens of the community, not the perceptions of the players in the situation." *Id.* The Commission has chosen to interpret this statute as a "prophylactic measure" and, as the Supreme Judicial Court noted, the language of the statute accords with that interpretation. *Scaccia*,

431 Mass at 359.

In making its determination as to the existence of an appearance of a conflict, the Commission must consider whether "such an appearance is warranted, or conversely is dispelled, by the 'relevant circumstances,' that is, by the facts." *In the Matter of Matthew Amorello*, 2009 SEC 2213, 2219 (although at first blush it might appear Amorello's conduct created an appearance of favoritism toward his senior staff, there was insufficient evidence in the record to support it). One of the factors considered in the analysis of a § 23(b)(3) claim is whether there is an outside relationship between a respondent and another person. *See Hebert*, 1996 SEC at 810 ("The Commission has long held that § 23(b)(3) is applicable where a public employee does, or may perform, actions in his official capacity which will affect a party with whom he has a significant private relationship.") Consistent with this approach, a § 23(b)(3) claim was dismissed based on the lack of an outside personal or social relationship. *Amorello*, 2009 SEC at 2219; *In the Matter of James B. Triplett*, 1996 SEC 827, 830. An additional factor may be whether a public employee's actions were undertaken due to a particular person's rank. *See In the Matter of Paul M. Wormser and Thomas Jefferson*, 2010 SEC 2303 (subordinate school superintendent violated § 23(b)(3) by negotiating reimbursements with a parent who was also a school committee member).

In order to conclude that a Respondent has violated § 23(b)(3), Petitioner must prove by a preponderance of the evidence that the Respondent knowingly, or with reason to know, (1) acted in a manner which would cause a reasonable person having knowledge of the relevant circumstances to conclude (2) that they were likely to act or fail to act as a result of rank, position or undue influence of any party or person (and additionally in the case of Anderson, that any person can improperly influence her or unduly enjoy her favor in the performance of her official duties).^{19/} Determining whether Petitioner has met its burden requires a review of whether the relevant circumstances, if known to a reasonable person, would lead them to the conclusions required to establish a violation.

For the reasons set forth below, we find that Petitioner has failed to meet its burden to prove a violation of § 23(b)(3) against each Respondent based on the evidence in the record as to the relevant circumstances. Those relevant circumstances include the nature of the relationship (or lack thereof) between any Respondent

on one hand and Bibaud or Judge Bibaud on the other.

As to Early, although the Bibauds worked in his office for a period of time, Bibaud had left her job there in 2013 and there is no evidence of any relationship or interaction between Early and Bibaud after she left the District Attorney's Office. At the time of the relevant events in October 2017, the relationship between Early and Judge Bibaud had become strained a decade before. The evidence of any personal or social relationship between Early and Judge Bibaud was from almost two decades ago when they sometimes traveled in the same circles socially and Early attended a golfing trip on Cape Cod organized by Judge Bibaud.

Furthermore, based on the evidence of his own statements, Early acted out of a desire to protect himself and/or the MSP rather than to show any favoritism or preferential treatment to Judge Bibaud and/or his daughter. Early thought the judges were going to be "kind of mad" and "pretty upset" about the language in the report and more importantly, he was concerned that they were going to blame him or the MSP for it.

Although Travers also worked in the District Attorney's office at the same time as Bibaud and Judge Bibaud, there is no evidence that he had any friendship or personal relationship with or socialized with either Bibaud while they worked for the District Attorney's Office or any time after they left the office.

As to the MSP Respondents, although McKeon knew Judge Bibaud while working at the Worcester CPAC, he has not spoken to Judge Bibaud in twenty years, and he has no personal or familial relationship with him. McKeon had never met Bibaud. Anderson had never met either Bibaud or Judge Bibaud.

The fact that Early, Travers, McKeon, and Judge Bibaud are former colleagues and that they all (including Anderson) worked in different areas of the criminal justice system in October 2017 is not a sufficient circumstance to meet Petitioner's burden of proof that a reasonable person could conclude that they might act because of rank, position or undue influence of Judge Bibaud and/or Bibaud, particularly in the absence of any personal or social relationship or, in the case of Early, any recent one.

Finally, there are other relevant circumstances as they relate to the MSP Respondents. As to Anderson, the MSP operates as a paramilitary police organization. Failure to comply with an order through the chain of

command from the Colonel could have been the basis for Anderson to be disciplined. As to McKeon, he had a great deal of respect for Early, who was his former boss, and he perceived Early's phone call to be a complaint from a District Attorney which he did not typically receive. It is more likely that he acted because of this rather than because the matter involved the daughter of a judge.

Viewed in their totality, we find that Petitioner has not met its burden of proving that a reasonable person who was aware of the relevant circumstances could conclude that any Respondent was likely to act because of the rank, position, or undue influence of Judge Bibaud and/or his daughter or that additionally as to Anderson, any person could improperly influence her or unduly enjoy her favor in the performance of her official duties.^{20/}

VI. ORDER

For the reasons stated above, Petitioner has failed to prove by a preponderance of the evidence that Anderson, Early, McKeon, or Travers violated either § 23(b)(2)(ii) or § 23(b)(3). Accordingly, the matters against Anderson, Early, McKeon, and Travers are hereby **DISMISSED**.^{21/}

DATE AUTHORIZED: October 14, 2022

DATE ISSUED: October 19, 2022

^{1/} Anderson, Early, and Travers filed motions to dismiss for failure to state a claim as well as motions for summary decision while McKeon filed a motion for summary decision. At the close of Petitioner's case during the adjudicatory hearing, Respondents renewed their motions for summary decision.

^{2/} On April 27, 2022, Petitioner filed a Motion for Closing Argument Before the Full Commission which Motion was referred to and denied by the Commission by Order dated June 1, 2022.

^{3/} Exhibit ("Ex.") 1.

^{4/} The actual words of the Statements are not included because they are unnecessary to our decision given that at the time relevant to this case, there were judicial determinations made both to impound them and later to redact them.

^{5/} The narrative portion of the arrest report attached to

the complaint application is known as a statement of facts or a probable cause statement.

^{6/} Chief Justice Paul Dawley called Early on October 17 and told him that Bibaud's case was going to be transferred out of Worcester County to which Early did not object. The District Attorney has the sole and exclusive authority to prosecute a case even if the case is transferred unless he refers the prosecution to someone else.

^{7/} McKeon subsequently received a copy of the arrest report on October 17 from his staff.

^{8/} An observation report, also known as an EES, may be given to a Trooper to note something positive they did or to provide corrective criticism to assist in training. It is placed in the Trooper's file and used to prepare their annual performance review after which it is discarded.

^{9/} Ex. 2.

^{10/} Keenan later testified, however, that: "[he] sensed that [Travers] wasn't saying take this," and that Travers was looking for his direction and guidance. When questioned if "[Travers] just asked you if you could accept the document, right," Keenan replied "Yes."

^{11/} Judge Despotopulos testified similarly that Early responded with "[w]ords to the effect of can't we just change it out, something like that."

^{12/} The redactions made by Travers left more information visible than Sceviour's revised report as Sceviour had removed entire sentences while Travers redacted only portions thereof.

^{13/} As the record reflects, while the Presiding Officer attended the entire hearing in person, other Commissioners intermittently attended the hearing in person and/or remotely in real-time, and participated by submitting questions for the witnesses. The Commission also reviewed and heard oral argument on multiple dispositive motions prior to the adjudicatory hearing.

^{14/} This definition was included in the regulations after the Legislature gave the Commission statutory authority to promulgate regulations defining substantial value (provided it was not less than \$50) and establishing exemptions for situations that do not present a genuine risk of a conflict of interest or the appearance of a conflict of interest. G.L. c. 268A, § 23(f). In 930 CMR 5.00, *et seq.*, which provides exemptions for certain gifts, the Commission included a definition of substantial value. 930 CMR 5.05 ("Substantial value is

\$50 or more."). Both before and after the 2010 enactment of 930 CMR 5.05, however, the Commission has interpreted the phrase "substantial value" as having the same meaning for purposes of § 23(b)(2). *See In the Matter of Frederick Foresteire*, 2009 SEC 2220 (substantial value \$50 or more for purposes of § 23(b)(2) claim); *In the Matter of Darryl Clark*, 2014 SEC 2508 (substantial value \$50 or more for purposes of § 23(b)(2)(i) and § 23(b)(2)(ii) claims); *In the Matter of Richard Delorie*, 2021 SEC (Disposition Agreement) (substantial value \$50 or more for purposes of § 23(b)(2)(ii) claim); *In the Matter of Stacia Castro*, 2022 SEC ____ (Disposition Agreement) (substantial value \$50 or more for purposes of § 23(b)(2)(i) claim).

^{15/} The Presiding Officer qualified Goldberg as an expert witness *de bene*.

^{16/} Goldberg testified that from what he reviewed online, Bibaud and Judge Bibaud's reputations were not recoverable, based in part on the media coverage of the actions taken by Respondents with respect to the arrest report.

^{17/} Even if there were evidence of costs incurred by Bibaud or Judge Bibaud to rehabilitate their reputations, an additional issue would arise as to how to determine what costs were attributable to the Statements and what costs were attributable to information already in the public record as to Bibaud's two arrests in May and October 2017, including the statements in the report after redaction by Travers that Bibaud had used heroin that morning and had "mad[e] lewd comments throughout booking."

^{18/} In the future, the Commission may consider addressing intangible value in its regulations.

^{19/} Section 23(b)(3) further provides that it shall be unreasonable to so conclude if the public employee has disclosed in writing to their appointing authority, or in no appointing authority exists, disclosed in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

^{20/} Petitioner alleges that various actions of Respondents were impermissible, such as the attempt to replace the revised report with the original one in the court's file. If an act is impermissible, filing a disclosure under § 23(b)(3) will not make it permissible. *See In the Matter of Lona DeFeo*, 2009 SEC 2229 (no § 23(b)(3) violation where conduct would not have been permissible, even with a written disclosure).

^{21/} This Order renders moot Respondents' renewed motions for summary decision made at the close of Petitioner's case.

Concurring (Kantrowitz). While I concur with the conclusion of my fellow Commissioners, I write separately to address certain points.

As indicated above, to find a violation of G.L. c. 268A, § 23(b)(2)(ii), Petitioner essentially must prove three, among other, key elements: (1) substantial value; (2) not properly available to similarly situated individuals; and (3) unwarranted privilege. In my view, Petitioner failed to prove any of the three.^{1/}

Substantial value. While the opinion as to the § 23(b)(2)(ii) claims rests on this element, I note that the statute does not define substantial value while a subsequent regulation defines it as \$50 or more.^{2/} Over the course of time, this element, without either legislative, regulatory, or judicial review,^{3/} has been expanded to include a litany of so-called intangible benefits. These expansions, and the one proffered by Petitioner in this case, have the potential to swallow this element. For instance, in nearly every case, reputation or peace of mind may be present. So too, due process considerations are at play in that one who engages in certain conduct may not be on notice that such conduct is prohibited.^{4/}

Similarly situated individuals. Petitioner argues that "similarly situated individuals are arrestees who make statements that include sexually explicit or otherwise objectionable language that are recorded in an arrest report." This seems to be too broad. In my view, similarly situated individuals, in this case, are arrestees whose constitutional rights to a fair trial are jeopardized due to pretrial publicity. The greater the likelihood that the press has an interest in a case, either due to the notoriety of the one arrested or the specific facts of the case, the greater the need for prosecutors to act quickly to protect the rights of the defendant).^{5/ 6/} To address this prophylactically, Early, nearly a decade ago, trained and requested that local police departments, after writing a police report, not attach that report to the application seeking a criminal complaint, but rather a barebones statement of facts/probable cause statement, addressing the elements needed to establish probable cause. Direct quotations and even admissions are eschewed unless necessary to establish probable cause. A police report is ordinarily not a public record (but will be provided to the defense as was done here) while a probable cause statement is. In acting in this manner, the rights of the

defendant are, at least theoretically, protected. Such a practice has since been adopted by the District Attorneys throughout the Commonwealth. While preferred, police departments are not mandated to so act.^{7/}

Unwarranted privilege. Petitioner claims that the unwarranted privilege was having the highly charged comments removed and the report replaced which were not properly available to similarly situated individuals. Similarly and simply, it is not an unwarranted privilege to be afforded one's basic constitutional rights. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966); Supreme Judicial Court Rule 3:07: Rules of Professional Conduct, 3.6 and 3.8. Prior to arraignment, the attorney for Bibaud successfully moved to impound the MSP incident report and the statement of facts. At a subsequent hearing, the motion of Travers to redact the probable cause statement was also allowed. Both rulings were premised out of concern for improper pretrial publicity.

There were three police reports at play here - the original,^{8/} (Ex. 1), the revised one, (Ex. 2) and the redacted one^{9/} (Ex. 3). When the case was transferred to another District Attorney's Office, all three reports were provided.

Once the original police report was illegally publicly released in violation of the impoundment order, a firestorm of publicity ensued,^{10/} with the Governor, Attorney General, and even a local United States Congressman weighing in, stating "When the public safety is involved in all these cases, if you're harboring someone who is a drunk driver and you're shielding them from the legal consequences of their misconduct, you are putting a drunk driver back on the street and you're distorting the legal process." While the comments are laudatory, they are inapplicable here as the facts clearly established that the prosecution of an allegedly drunk and heroin impaired driver was in no way compromised by the actions of Respondents.

In sum, in my view, the evidence presented at the hearing demonstrated that the actions of Respondents were motivated to protect the rights of a criminal defendant^{11/} who suffered from substance abuse. The evidence also revealed that Early was sensitive to the sufferings of such individuals and implemented forward thinking policies to address this serious and on-going situation.^{12/}

In the end, a judge authorized what Respondents sought - replacing (not destroying) the original police report with a redacted one deleting prejudicial and unneeded language. In hindsight, the better way to accomplish what Respondents sought was to simply go into court

and not initially to the Clerk. If this had been done, we would not be here today.

R. Marc Kantrowitz

^{1/} This is not to suggest that Petitioner did not perform well at the hearing. Indeed, the attorneys for all of the parties were excellent.

^{2/} Prior to the enactment of the regulation, the Commission interpreted substantial value as \$50 or more.

^{3/} Which is not surprising given that the cost to conduct a hearing and appeal of an adverse ruling, would, in the overwhelming number of cases far exceed any civil penalty imposed by the Commission.

^{4/} For instance, it appears that the Commission has never based a decision as to the substantial value element solely on the basis of reputation. As Respondents did not press a due process objection, no further comment is necessary.

^{5/} This is not to say that those who are well-known should be given preferential treatment. An otherwise unknown person who commits a noteworthy crime is entitled to the same protections. Regardless of one's status, as the specter of pretrial publicity rises, so does the need to react quickly.

^{6/} The MSP, as well as presumably other police departments, have a policy that the higher ups should be apprised of any noteworthy arrests that may result in questions being asked either internally or from the press. The reason for the policy is the need to be able to quickly respond to inquiries.

^{7/} It is curious given the relationship between McKeon and Early that this was not required of all State Troopers. While State Troopers assigned to DA Early's office followed the mandate, Troopers in the field, notably Sceviour, did not. Early wishing that a revised report be written was in conformity with his enunciated practice of having the police file bareboned probable cause statements accompanying applications for criminal complaints. Still though, the better practice was for Early or one of his assistants to merely go into open court and request what was eventually done.

^{8/} Suffice it to say that the language included was salacious and lewd and worthy of causing Early's "head [to] explod[e]." Although the statements were admitted

in evidence and earlier released publicly, I do not repeat them here given the Commission's desire, if not obligation, to minimize embarrassment to one who is a non-party. There can be little doubt that these highly charged statements added nothing to probable cause and would not have been admissible at trial. *See Massachusetts Guide to Evidence*, Section 403 (probative value outweighed by unfair prejudice).

^{9/} The revised report, which was clearly marked "REVISED ON OCTOBER 19, 2017," was written by Sceviour. Travers made changes to the copy of the probable cause statement (the arrest report narrative attached to the criminal complaint application) to create the redacted report with deletions not as extensive as the revised one. Both deleted the explosive language at issue.

^{10/} Regrettably, the one who unlawfully released the report has never been identified other than apparently being a member of the MSP, underscoring a sad theme throughout the hearing of the poor relationship, at the time, between management and the Troopers in the field, exacerbated in part by a significant MSP overtime pay scandal.

^{11/} For instance, when Anderson received a call from her superior ordering her, which she felt compelled to follow, to speak with Trooper Sceviour about revising the report, her notes taken contemporaneously with that conversation indicate, among other things: "**negative or derogatory comments**;" "probable cause elements only;" "inappropriate commentary;" and "on top of report **revised**." (emphasis in original). Notably absent are any references to "judge" or "judge's daughter." Ex. 12.

^{12/} Indeed, when Keenan went to see Judge Despotopulos, Early was speaking with him about visiting a drug treatment center that Early thought effective.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 21-0003**

**IN THE MATTER OF
GARY HALEY**

Appearances: Richard Gross, Esq. for Respondent
Gary Haley

Candies Pruitt, Esq. for Petitioner

Commissioners: Maria J. Krokidas
R. Marc Kantrowitz
Josefina Martinez
Wilber P. Edwards, Jr.
Eron Hackshaw

Presiding Officer: Eron Hackshaw

FINAL DECISION AND ORDER

I. INTRODUCTION

Petitioner alleges that in 2018, the Town of Aquinnah began a project to move all overhead electrical and telecommunications wires underground at Aquinnah Circle, a major tourist destination. Petitioner also alleges that in May, 2018, when Comcast and Verizon informed the Town that they were unavailable to lay conduits for telecommunications wires in a trench opened by Eversource, Respondent Gary Haley ("Haley"), a member of the Aquinnah Select Board and also a master electrician, decided to do the work for the Town himself.

In addition, Petitioner alleges that Haley submitted an invoice for the work and subsequently participated as a Select Board member in approving the expense warrant that included his own invoice. Finally, Petitioner alleges that Haley's invoice for \$17,160 in labor charges for ten days of work was false and fraudulent in that the conduit installation was performed for at most seven days and/or Haley charged for laborers whom he did not hire or pay.

Petitioner alleges that Haley violated the following provisions of the conflict of interest law:

- Violated § 19 by participating as a Select Board member in a particular matter in which to his knowledge he had a financial interest by deciding that he would personally install conduits for telecommunications wires during a project at Aquinnah Circle "and effectively awarding himself a contract with the Town;"
- Violated § 20 by having a financial interest, of which he had knowledge or reason to know, in a contract made by the Town in which the Town paid him for services and materials he provided to lay conduits for telecommunications wires at Aquinnah Circle;
- Violated § 19 by participating as a Select Board

member in a particular matter in which to his knowledge he had a financial interest by voting to approve an expense warrant that included the invoice that he had submitted to the Town for the work; and

- Violated § 23(b)(4) by, knowingly or with reason to know, submitting a false or fraudulent claim to the Town for payment of substantial value because the invoice misdescribed and overstated the labor he provided for the conduit installation.

II. PROCEDURAL HISTORY

Petitioner initiated these proceedings against Respondent Haley on May 19, 2021 by filing an Order to Show Cause. Haley filed an Answer that included admissions, denials and further explanations. By order, the Answer was deemed filed on July 13, 2021. Each party filed a dispositive motion. Petitioner's Motion for Partial Decision on the Pleadings was filed on August 17, 2021. Respondent's Motion for Summary Decision was filed on August 23, 2021. Both motions were denied on December 28, 2021.

An Adjudicatory Hearing was held in this matter in person before the Presiding Officer and also remotely via videoconference on June 6 and 7, 2022. Commissioner Hackshaw was the Presiding Officer. Nine witnesses testified at the hearing. During the hearing, twenty-six exhibits were admitted into evidence. After the close of the hearing, Respondent filed an Expedited Motion to Supplement the Record on July 19, 2022, and three more exhibits were admitted on July 25, 2022. Closing arguments were held before the full Commission on September 8, 2022. The Commission began its deliberations in executive session on that date and continued deliberations on October 14, 2022.¹ In rendering this Final Decision and Order, each undersigned member of the Commission has considered the testimony, the evidence in the public record, and the arguments of the parties.

III. FINDINGS OF FACT

Events prior to the beginning of the work at Aquinnah Circle

Gary Haley has been a member of the Select Board for the Town of Aquinnah for six years. Haley is also a master electrician and does business as a d/b/a.

The Town of Aquinnah Community Preservation Committee ("CPC") undertook a project to improve the aesthetics at Aquinnah Circle. The chairman of the CPC was Derrill Bazy. Among other things, the Town wanted to remove overhead wires at Aquinnah Circle

and bury them underground. There was discussion about the project for eight to ten years.

Funding of this project was provided by a 2016 Town Meeting warrant. The warrant included an article to appropriate or reserve for later appropriation monies for the CPC for historic preservation, recreation and open space purposes, and particularly "[t]he preserving of vistas through the burial of overhead wires at Aquinnah Circle..." While the CPC would have direct supervision of the uses and purposes of the funds, approval by the board of selectmen would be required. In the Article, the CPC requested \$300,000 at a maximum annual cost of \$35,000 over a 10-year period. Haley approved the Town Meeting warrant as a Select Board member, along with Julianne Vanderhoop and Jim Newman on November 1, 2016.

The project required burying electrical wires and telecommunications wires. Eversource, Verizon and Comcast submitted estimates to the Town for the project. Comcast had a franchise agreement with the Town. Later, representatives from those companies and the Town met about the project. Haley or Jeffrey Madison, the Town Administrator, represented the Town at the meetings. Madison, an attorney, was the Town's procurement officer.

Accomplishing the project would involve digging a trench a little over three feet deep, then installing electrical conduits. Next, a layer of sand would be laid over the electrical wires because there needs to be separation between high voltage and low voltage wires. Then the low voltage telecommunication conduits would be installed, there would be another layer of sand and they would be covered with rock or pavement. Electric wires then would be pulled through the bottom conduits and Comcast and Verizon then would pull cable through the other conduits.

During the project, Eversource would install the electrical conduits and wires. As for the telecommunications wires, at different times in April, 2018, Comcast and Verizon each approached Haley about installing the conduits for them.

Select Board member Vanderhoop had a conversation in 2018 with Haley and Select Board member Jim Newman, and Haley told them he was going to try to get a contract from Verizon or Comcast to bury cables at Aquinnah Circle.

At a Select Board meeting, likely April 2018, Haley said he was going to lay the pipe in for Comcast and Verizon, and the other two Select Board members, Vanderhoop and Newman, gave him the okay to do the work. At the time, Haley estimated \$2,000 or \$3,000 to

lay the pipe. He expected Comcast and Verizon to pay him.

Haley's conversations with Comcast and Verizon ultimately did not result in any contract or agreement. In the spring of 2018, Eversource contacted CPC Chairman Bazy about starting its part of the work. Town Administrator Madison called Comcast and Verizon, told them that the trench was going to be opened, and asked them to install their conduits. Comcast and Verizon could not accommodate his request. Comcast had no crew that was able to coordinate with Eversource at that time.

Madison's goal was to complete the project before Memorial Day. Summer is tourist season, and thousands of people come to Aquinnah Circle. Madison thought that an open trench would be dangerous for tourists if they had to walk across it.

Closing the trench would cause other complications. At that location, the only place that telecommunications conduits could be installed underground was over the electrical conduits. Another trench could not be opened for them in a different location. If Eversource installed the electrical conduits and closed its trench before the telecommunications conduits were installed, Eversource would have an easement over the closed trench. The easement would not prevent a subsequent utility from later opening the trench and putting in their conduits, however.

James Baronas, a project coordinator for Comcast, coordinated Comcast's efforts with regard to the Aquinnah Circle project. In his view, wanting to get the job completed by Memorial Day was not an emergency.

The arrangement that Haley made with Madison

Select Board member Haley was Town Administrator Madison's boss. In May, 2018, Madison told Haley that Comcast and Verizon could not do the work at Aquinnah Circle. Madison told Haley it was an emergency.

Haley told Madison he would put the telecommunications conduits in. Haley expected the work to take an hour a day or less. He expected that the trench would be open 50 or 60 feet, he would go at 3:00 p.m. and lay the telecommunications conduits, and Eversource would cover it over, and this would take six or seven days.

Haley told Madison he would put the pipes in "as a volunteer for free." Haley did not tell Madison that he was going to charge him for it. Neither Madison nor

Haley thought they had made a contract. Haley had volunteered to help out the Town before and did not charge for the work. Madison understood that Haley had done so in the past.

The work Haley did at Aquinnah Circle

John Dumas was the Supervisor of Electric Operations for Eversource Energy in Martha's Vineyard in May, 2018. Dumas hired Paul Bettencourt, a preferred contractor for Eversource, to install the electrical conduits underground at Aquinnah Circle. Bettencourt hired a subcontractor, Maciel & Sons ("Maciel"), to dig the trench, remove material, and backfill afterwards.

Bettencourt and Haley had conflicts about how the work would be done. Haley expected Eversource to lay the sand over the electrical conduits before he put in the telecommunications conduits. On the other jobs Haley had done, whoever was doing the excavating would put the sand over the conduits. Bettencourt told Haley that he would need to put the sand in the trench himself. Bettencourt told him, "These are my machines that are working in there and you're not using them."

Bettencourt's view was that he and Maciel were not required to do the backfill between the electrical and telecommunications conduits to facilitate Haley's work. In the calculation of costs that Bettencourt had done for Eversource, Bettencourt only included the cost of opening the trench, laying the high voltage conduit and then filling and closing the trench, not the additional cost of laying the sand over the high voltage conduits and waiting for the low voltage conduits to be laid and then filling and closing the trench.

At the start of the first day on the job, the whole job changed for Haley. When he learned that Eversource would not do what he expected them to do in covering the conduits, the scope of the work increased significantly because it required him to backfill the trench with sand by hand. He immediately understood that he would need the assistance of two more workers. Nonetheless, Haley took it upon himself to do the work, without consulting anyone else, even though the job specs had changed.

Haley's invoice

After completing the work, Haley submitted an invoice to the Town for \$17,445.

Although the date that Haley put on his invoice was June 11, 2019, the correct date when it was received was June 11, 2018, as the date stamp indicates.

The invoice states:

Installed 4 inch PVC conduit pipe and 2 inch PVC conduit pipe into an underground trench from the new pole # 1/92 at the intersection of Lighthouse Road and State Road along the road of the circle to the last pole located at the Aquinnah shop parking lot pole # 1/97.

A total of approx. 1900 feet of conduit pipe was installed for Comcast and Verizon's future underground wire burial.

The invoice indicates that work was performed 8 hours a day on May 9-11 and May 14- 19 and 6 hours on May 21, for a total of 78 hours. Haley charged \$120 an hour for 78 hours of his own work, for a total of \$9,360, and \$50 an hour for 78 hours of work by two laborers, for totals of \$3,900 for each. The total for labor was \$17,160. There was also a charge of \$285 for materials supplied.

Included in the charge for the 78 hours of work are charges for 22 hours of work by Haley and the two laborers on May 18, 19 and 21, which was after the Eversource trench was closed.

Charges for two laborers at Aquinnah Circle

During his Sworn Interview in these proceedings, when Haley was first questioned about who helped him do the work at Aquinnah Circle, he said, "I don't remember." He eventually said, "Justina and Chuck," but otherwise would not say their names.

Eventually, Haley identified Justina Jenkins and Charles Addonizzio as laborers whom he moved from a job at a house on Lighthouse Road to help him work at the Eversource trench after he found out that he would have to lay the sand over the electrical conduits himself.

Haley pays laborers with cash. 1099 forms with Gary Haley as the Payor and Justina Jenkins and Charles Addonizzio as the Recipients show payments to each for \$3,900. There are no Social Security numbers for Jenkins or Addonizzio on these forms.

Several witnesses saw two people working with Haley at the Eversource trench, but no one identified them as Jenkins or Addonizzio. John Dumas from Eversource went there at least once a day and sometimes twice. He saw Haley installing cable conduit and saw a young woman and young man working with him. Both had hardhats and vests and boots, and Dumas gave them safety glasses. Dumas "distinctively remember[s]" asking Haley who they were, and Haley said they were relatives.

In May, 2018, the Aquinnah Police Department provided details at the site of the project in Aquinnah Circle at the request of Dumas. Details were provided from May 9-11 and from May 14-17, 2018.

Randhi Belain is the Chief of Police in Aquinnah. His appointing authority is the Select Board.

Chief Belain performed one detail on May 15, 2018. He also passed the site on patrol duty once or twice on the days when the project was occurring. During the detail and at least twice when he passed by on patrol, Belain saw Haley at the site as well as a female and a male working with him. Belain identified the female as Kristina Metros, who is Haley's niece. Belain was certain that he saw Haley and Metros wearing work clothes and digging in the trench at Aquinnah Circle. He saw Metros with a shovel in her hand.

Steven Mathias is a full-time police officer at the Aquinnah Police Department. He is appointed by the Select Board with the recommendation of the Police Chief. Mathias once hired Haley to do a small electrical job for him at his home in Oak Bluffs.

Mathias worked two details protecting the trench at Aquinnah Circle. During his police details, Mathias saw Metros with Haley, wearing a reflective vest and hardhat like Haley. Mathias did not see anyone else with Haley.

Paul Bettencourt, Eversource's contractor, saw Haley with two people, male and female, at the job, and the female "had some shaved head on one side." Haley described his niece as having "shaved hair."

Charges for twenty-two hours of work after the Eversource trench was closed

Haley's invoice does not include a description of the following work that Haley says he did along with two laborers: From May 18 - 21, to bury additional overhead wires, they dug one trench to a pole at the lighthouse and put in conduits and handholds for Verizon and Comcast. They dug another trench near the stairway to Vanderhoop's shop, which was Town-owned property, put in conduits for Comcast, Verizon and Eversource and sank a pipe for the shop.

According to John Dumas from Eversource, Haley, not Eversource, buried the overhead service to the shop after the seven-day period when the work was done in the Eversource trench.

Police Chief Belain saw Haley once working at Aquinnah Circle after the trench had been closed. Haley was working at a telephone box at the bottom of the

stairs of Aquinnah Circle that lead up to the cliffs and the shops.

Payment of Haley's invoice

Haley presented his invoice to Town Administrator Madison. Madison was surprised to see it because until that point he did not think that Haley was going to charge the Town to lay the conduit. Haley responded that he was submitting an invoice to the Town because the specifications of the job had changed and he had to fill the trench, requiring more time and additional labor.

There are two ways that an invoice can be approved for payment by the Town of Aquinnah. First, an invoice could be paid in the ordinary course of business by way of an expense warrant that is approved by the Select Board. Second, the invoice could be put on a warrant to Town Meeting for a vote about whether to pay it.

Madison submitted Haley's invoice to be paid by way of an expense warrant. Madison's signature on Haley's invoice meant it was okay to pay it. The handwritten note, "CPC fund," means payment was coming from the CPC funding source.

Payment of Haley's invoice followed the normal course. Once or twice a week, the Town Accountant closes the warrant and prints a report and submits it to the Select Board. The report has three pieces: 1) a detail report which lists out each invoice along with the funding source, 2) a summary page which summarizes from what fund the payment is coming, e.g., the general fund, the CPC fund, the gift fund, and 3) a signature page which includes lines for the Town Accountant's signature and each member of the Select Board. That packet of reports is on top of a folder containing each invoice that they are paying. After the Select Board approves the warrant, the Town Administrator prints checks and the treasurer signs and mails them.

Town of Aquinnah Warrant TW18-29 was posted on June 20, 2018. Select Board members Haley and Vanderhoop signed the warrant.

Haley received a check in the amount of \$17,445 about three weeks after he submitted his invoice.

IV. BURDEN OF PROOF

Petitioner must prove its case and each element of the alleged violations by a preponderance of the evidence. 930 CMR 1.01(10)(o)(2). The weight to be attached to any evidence rests within the sound discretion of the Commission. 930 CMR 1.01(10)(n)3. In determining this case, the Commission must make a determination

of every issue of fact or law necessary to its Final Decision. 930 CMR 1.01(10)(o)3.

V. SECTION 19 CLAIM- Decision about who would install conduits

To prove that Haley violated § 19, Petitioner must prove by a preponderance of the evidence that Haley (a) was a municipal employee; and (b) participated as such an employee; (c) in a particular matter; (d) in which he had a financial interest; and (e) that he had knowledge of the financial interest. *In the Matter of Paul Pathiakis*, 2004 SEC 1167, 1174.

There is no question that at all relevant times, Haley was a municipal employee of the Town of Aquinnah as a member of the Select Board.

Omitting exclusions that are not relevant here, "particular matter" is defined to mean "any judicial or other proceeding, application, submission, request for a ruling or other determination, contact, claim, controversy, charge, accusation, arrest, decision, determination, finding..." G.L. c. 268A, § 1(k).

Petitioner alleged, and Haley admitted in his Answer, that the decision of who would install the utility company conduits was a particular matter.

Petitioner further alleged that Haley participated in that particular matter as a member of the Select Board by deciding to install the conduits himself and effectively awarding himself a contract with the Town. We find that Petitioner has proved by a preponderance of the evidence that Haley participated as a Select Board member in the decision about who would install the telecommunications conduits for the Town by deciding to install the conduits himself² and that, to his knowledge, he had a financial interest in the matter when he took responsibility for doing the work for the Town.

"Participate" means to participate in agency action or in a particular matter personally and substantially as a ... municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigator or otherwise. G.L. c. 268A, § 1(j).

The evidence is clear that Haley, a Select Board member, as well as Madison, the Town Administrator, represented the Town at meetings with representatives for Eversource, Comcast and Verizon about the burial of the overhead wires at Aquinnah Circle. When a problem arose and Comcast and Verizon informed Madison that they would not send crews to install the conduits, Madison conferred with Haley. As a Select Board member, Haley was Madison's direct supervisor.

He told his subordinate that he would install the conduits for the telecommunications wires. By doing so, he participated as a Select Board member in the decision about who should install the conduits for the Town by deciding to do it himself.

Before the work even began, Bettencourt informed Haley that he would have to lay the layer of sand over the electrical conduits himself. Haley knew that the scope of the work and associated costs had increased and that he could not do the work by himself or do it for free. Without consulting again with Madison about the significant change in circumstances, he followed through with the decision to do the work for the Town nonetheless. He unilaterally decided that the Town would be charged for the work, determining on his own what the payment to himself would be.³ See *In the Matter of Howard Hansen*, 2017 SEC 2604, 2610-2611 (Stoughton Town Moderator had a financial interest in a particular matter when he decided to charge the Town for payments to himself and his own printing business for materials used by him as Town Moderator), *In the Matter of Stephen Comtois*, 2020 SEC 2707, 2710-2711, *aff'd*, *Comtois v. State Ethics Commission*, Suffolk Superior Ct. 2084CV02105 (2021) (Brookfield Selectman acted as a Selectman in a particular matter in which he had a financial interest when he voted to send an article to Town Meeting about whether the Town should accept a donation of a parcel of land and then called the realtor the next day to report the results of the meeting and offered to purchase the land himself). The work was already completed when Haley gave Madison an invoice for \$17,445 for the Town to pay.

That Haley had a financial interest in the decision about who would do the work for the Town was demonstrated by the evidence. "Financial interest" is not defined in the conflict of interest law, but a long-standing interpretation is that a financial interest may be large or small, positive or negative, and must be direct and immediate or reasonably foreseeable rather than remote, speculative or not sufficiently identifiable. *Comtois*, 2020 SEC at 2710. Initially, Haley had his sights on being paid when Comcast and Verizon each approached him about installing the conduits for them. He informed his fellow Select Board members, Julianne Vanderhoop and *Jim* Newman, of this during a conversation that Vanderhoop recollects, and the other two Select Board members okayed it at a Select Board meeting in "probably April" 2018. At that time, Haley understood the value of the work to be \$2,000 - \$3,000. As Haley explained, he expected Comcast and Verizon to pay, "but they didn't pay. The town ended up paying." Haley may first have told Madison that he would do the work for the Town "for free," but his

decision soon after that the Town would be charged for the work meant that he would be paid to install the telecommunications conduits after all.

Haley justifies his decision to have the Town pay for his services because the need to install the telecommunications conduits was an emergency. To this argument, Petitioner responds that getting the work done before Memorial Day was not an emergency, and that even if it was, that does not mean that the work done for pay needed to be done by Haley.

We agree with Petitioner that there was no emergency. We base this conclusion on the following evidence. Baronas from Comcast, who was in the business of coordinating telecommunications installations, opined that there was no emergency. While the Eversource trench was open, police details prevented harm to the public. If the Eversource trench had to be closed and this gave Eversource an easement, Comcast had a franchise agreement with the Town, and as Petitioner notes, the Federal Cable Act, 47 U.S.C. § 541(a)(2) authorizes Comcast to construct its cable system "over public rights-of-way, and through easements." Even Madison acknowledged that the Eversource trench could have been closed and later reopened to enable installation of the telecommunications conduits. While such an approach could have increased costs for the Town, it was not an emergency.⁴

The circumstances were not so dire that alternatives could not have been explored when, before even beginning the work, Haley decided that he should do the work for the Town and do it for pay. Certainly, to the extent that Haley charged the Town for digging additional trenches to Vanderhoop's shop and the lighthouse and installing conduits for electrical and telecommunications wires there, no emergency required this work to be done at that time or by him.

VI. SECTION 20- Financial interest in a contract with the Town

Under § 20, a municipal employee of a town may not knowingly have a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town. In order to establish a violation of § 20 against Haley, Petitioner must prove by a preponderance of the evidence that Haley (1) was a municipal employee, (2) who had a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, (3) of which financial interest he had knowledge or reason to know. *In the Matter of Louis Picano*, 2011 SEC 2358, 2359, *Pathiakis*, 2004 SEC at 1176. As we find that there was no contract between Haley and the Town, we conclude

that there was no § 20 violation.

In precedent, the Commission has held that "... any type of agreement or arrangement between two or more parties, under which each undertakes certain obligations in consideration for promises made by the other, constitutes a contract." *In the Matter of Howard Hansen*, 2017 SEC 2604, 2612, *Pathiakis*, 2004 SEC at 1176, citing *EC-COI-87-14*. A contract is "a bargained-for exchange of offer, acceptance, and consideration." *Quinn v. State Ethics Commission*, 401 Mass. 210, 216 (1987). Consideration in the common law sense is a benefit to the promisor. *Quinn*, 401 Mass. at 216.

In *EC-COI-06-1*, the Commission noted that "the Commission, as well as the courts, 'have given the term 'contract' a broad meaning to cover any arrangement in which goods or services are to be provided in exchange for something of value.'" *EC-COI-92-35; Quinn v. State Ethics Commission*, 401 Mass. 210, 215-16 (1987)." (Other cites omitted).

Petitioner argues that Haley had a financial interest in a contract made by the Town as a result of deciding, in his capacity as a Select Board member, that he and his d/b/a would install the conduits for the Comcast and Verizon wires. According to Petitioner, the evidence shows that Haley's business installed the conduits, that he issued an invoice to the Town, and the Town paid the invoice. Consequently, Haley installed the conduits in exchange for payment and, Petitioner concludes, this was a contract. Petitioner likens Haley with the Town Moderator in *In the Matter of Howard Hansen*, 2017 SEC 2604, who agreed with himself to pay amounts from the Town Moderator's budget to himself or his own printing company for materials he used as Town Moderator.

For his part, Haley counters that when Haley told Madison he would install the telecommunications conduits for the Town, there was no offer, no acceptance and no consideration, and no meeting of the minds, and therefore no contract. Madison did not get an estimate from Haley of what the work would cost, or discuss any terms such as insurance, workers compensation, or indemnification for negligence. Rather, there initially was a mutual understanding that Haley intended to do the work at no cost to the Town. Haley argues that when he subsequently delivered an unexpected invoice for \$17,445 to the Town, it was not pursuant to a contract, and instead the basis for payment of it was *quantum meruit*, the recovery of the value of the work done in order to prevent unjust enrichment.⁵ See *Boston Athletic Ass'n v. International Marathons, Inc.*, 392 Mass. 356, 367-368 (1984).

As there was no evidence to the contrary, we credit the testimony by both Haley and Madison that their original understanding was that Haley would seek no payment for installing the conduits. This distinguishes Haley's situation from the one in *Hansen*, where from the beginning Hansen expected to pay himself from the Town Moderator budget and knew how much he would pay himself. The invoices for printing services that Hansen delivered to himself as Town Moderator were evidence of a series of agreements that he previously made with himself to pay Town funds in exchange for his own printing services to be rendered.

By comparison with Hansen, Haley had no agreement with himself to pay himself from the outset. The invoice that Haley presented to Madison was not submitted pursuant to a prior agreement regarding payment, and was not, in and of itself, a contract. When Haley presented the invoice to Madison, his services already had been fully provided. As a matter of contract law, past consideration will not support a contract. *Stroscio v. Jacobs*, 2 Mass. App. Ct. 827, 828 (1974). Consequently, Haley's completed services were not consideration for a new promise by the Town to pay. *See, e.g., Conant v. Evans*, 202 Mass. 34, 38 (1908) (where no agreement regarding payment was made before a surgeon performed an operation on the defendant's minor son, the services already rendered by the surgeon were not consideration for a subsequent promise by the defendant to pay).

Having initially told Madison that he would install the telecommunications conduits for free, Haley did all of the work and then submitted his invoice. "That which is presented as a gratuity cannot thereafter be transformed into the basis for a contract, simply because a change of circumstances may make it highly desirable for the donor to recover pay for the gift." *Silano v. Carosella*, 272 Mass. 203, 206 (1930) (no contract found where relative furnished defendant and his daughter with board, room, care and clothing from 1922 to 1927 with no intention to charge them, and then sought compensation for these items when a financial controversy arose between them in 1937). *See also Ramseyer v. Conlon*, 303 Mass. 270, 274 (1939) ("... the rendition of services or the transfer of property accompanied by a donative intention fixes and establishes definitely and finally the rights of the parties and prevents a gift from ripening into a contract.") The Town had no contractual obligation to pay Haley's invoice, even if it eventually did so.

The evidence shows that Haley, who had a duty as a Select Board member to look out for the Town's best interests, essentially decided on his own to transform a gift from him to the Town into a charge that the Town should pay, and then did not inform Madison or any

other Town employee about this change until work valued at \$17,445 already had been completed and he asked the Town to pay for it. However objectionable this conduct might be, it did not create a contract.

In fact, when § 20 would have prohibited Haley to have a contract with the Town to do the work at Aquinnah Circle for pay unless he could meet the requirements of an exemption, Haley did an end run around § 20, soliciting payment from the Town for work he completed without any prior agreement to do so. We do not condone this conduct any more than we could condone a violation of § 20.

Having found no contract, we decline to agree with Haley that the basis of the Town's payment to him was *quantum meruit*, a concept which would imply that payment of the invoice was justified. Sprung by surprise, Haley's invoice made it past several Town officials who had obligations to be the guardians of Town funds. Payment of Town money when there is no legal obligation to pay it raises obvious concerns, including accountability to Town residents, and more so when the person pursuing the payment is a municipal employee. Where Haley reneged on a gift, did not have a contract, and was prohibited by § 20 from having one, serious questions are raised about diligence of oversight and the rationale for paying the Select Board member for his services anyway.

VII. SECTION 19 CLAIM - Approval of the payment warrant

The elements of a § 19 claim previously were explained above. In Petitioner's second allegation regarding § 19, Petitioner must prove by a preponderance of the evidence that Haley participated as a municipal employee in a particular matter, the approval of Warrant TW18-29, when, to his knowledge, he had a financial interest in the matter because his own invoice was included in it.

Much with regard to this count is undisputed. The evidence is clear that Haley signed an expense warrant which included his own invoice, and that he signed the warrant in his capacity as a Select Board member. There is also no question that Haley had a financial interest in the payment of the invoice that he submitted, and therefore in the approval of the expense warrant. The only serious dispute about this second §19 allegation is about whether Haley, "to his knowledge," had a financial interest in the particular matter.

Haley insists that he did not have actual knowledge that his invoice was included in the expense warrant. First, he testified that he expected his invoice to go in a warrant to be voted on by Town Meeting rather than an

expense warrant, which are approved by the Select Board. Haley was on notice, however, that payment from CPC funds for the beautification of Aquinnah Circle, including the burial of the overhead wires, had to be approved by the Select Board because he had signed a Town Warrant that included an article to that effect in February, 2018. In addition, Haley knew that, in the ordinary course, payments of invoices were accomplished by way of expense warrants approved by the Select Board. Common sense would dictate that if his invoice for a significant amount of money was submitted on June 11, 2018, an expense warrant presented to him only nine days later might include it. His testimony to the effect that this did not occur to him is not credible.

Second, Haley argues that Select Board members do not have a practice of reviewing the individual items and invoices contained in warrants. He sees the Town Accountant's signature or Madison's signature at the top, then he knows that everything inside is invoiced out of the right accounts. The problem with this excuse is that it shifts responsibility for knowing what is in the expense warrant from Haley, a Select Board member whose duties included approving expense warrants, to someone else.

Under G.L. c. 41, § 56, Select Board members have the responsibility to approve expense warrants. The statute gives responsibilities to the town accountant and treasurer, but explicitly states that "the treasurer shall pay no money from the treasury except upon such warrant approved by the selectmen." *Id.* Select Board member Vanderhoop acknowledged that the Select Board, not the Town Accountant, approve warrants for payment of bills and invoices and that an invoice would not be paid if the Select Board declined to sign the warrant.

Accordingly, we agree with Petitioner that Haley could not be "willfully blind" to the fact that his invoice was in an expense warrant that he was called upon to approve. Petitioner points to Public Enforcement Letter 00-2: *Janis Montalbano*, 2000 SEC 969, as support for this proposition. In *Montalbano*, the Commission had found reasonable cause to conclude that, between 1996 and 1998, a member of the Narragansett Regional School District School Committee violated § 19 by approving school committee warrants which included twelve payments to companies owned by her husband and son. The Commission determined that the decision to sign each warrant authorizing payment to vendors was a particular matter. *Id.* at 970.

The school committee member had provided information that the school committee members never

reviewed individual bills on the warrants, and that if she signed warrants that included her husband's and son's bills, she was just approving the total amounts. *Id.*

The Commission cited the following law:

"If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with 'knowledge' of what he would have seen had he looked. *Demoulas v. Demoulas*, 428 Mass. 555, 577 (1998) (quoting West's Case, 313 Mass. 146, 151 (1943)). "Proof of actual knowledge is frequently shown where one is in possession of information of such weight and reliability that men commonly act upon it as true. Absolute certainty is not required." West's Case, 313 Mass. at 150. Where one has sufficient information to know a fact, then one cannot avoid the consequences of knowledge by remaining in willful ignorance. *Id.* at 1505. See also *Van Christo Advertising, Inc. v. MIA-COM/LCS*, 426 Mass. 410, 416-17 (1998) (claim of willful ignorance will not be excused if information would have been known had person simply not consciously disregarded it).

Montalbano, 2000 SEC at 971. The Commission then found that the School Committee member closed her eyes to the facts that would have informed her of conflicts. Because she knew that her husband and son had done work for the school department and that payments to them would come up on the warrants, the Commission applied the doctrine of "willful blindness" and charged her with the knowledge that she would have had if she read the names listed in the warrants. *Id.* On this basis, the Commission deemed that she had knowledge of her family's financial interests when she approved the warrants. *Id.*

Even if Haley insists that he did not know that his invoice was included in the warrant, the evidence shows that he knew that he had submitted an invoice and that invoices were paid by way of expense warrants.

Haley objects that *Montalbano* is distinguishable from his situation because the school committee member approved her husband and son's payments for many years rather than just once. The short answer to this comment is that once is enough.

Haley also notes that the *Montalbano* letter recommended that staff have a practice to avoid having a board member sign warrants that include invoices for family members, and that the Aquinnah Select Board did have such a practice, but it was not followed. In particular, he points to a "practice" that the Town Accountant has of putting a note on an expense warrant to alert a Select Board member when the expense warrant includes an invoice payable to the Select Board member. As the Town Accountant testified, she inadvertently failed to follow the "practice." Haley complains that, as a result, no one told him that his invoice was in warrant TWIS-29.

As a factual matter, however, according to Town Accountant Day, the only time that a note of this type was put on an expense warrant, it was done by the previous Town Accountant at a time when Day was transitioning into the job. This "practice" had not been followed by Day even once. She testified, "the practice is more a plan in theory that I'm supposed to do that..."

In addition, Haley ignores the final sentence in the paragraph in *Montalbano* that recommends having such a practice: "In making this suggestion, of course, the Commission does not mean to discount the importance of board members' personally reviewing the documents that they sign." *Id.* at 971.

For the reasons stated above, based on the doctrine of willful blindness, we conclude that Haley is deemed to have knowledge of his own financial interest when, as a Select Board member, he participated in approving warrant TW 18-29.

VIII. SECTION 23(b)(4)- False and fraudulent claim for payment

To establish that Haley violated § 23(b)(4), Petitioner must prove that Haley (1) was a municipal employee, (2) who knowingly or with reason to know, (3) presented a false or fraudulent claim to his employer for a payment or benefit of substantial value. *In the Matter of Stephen Hyde, Sr.*, 2014 SEC 2543, 2546.

In the context of this matter, substantial value means a value of \$50 or more. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000) (rescript), *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976), *EC-COL-93-14*. See also 930 CMR 5.05, *In the Matter of Scott Chatigny*, Disposition Agreement, 2021 SEC ___, n. 2, *Hyde*, 2014 SEC at 2548 and n. 17 (regulatory standard was mentioned in the context of § 23(b)(2)(ii), but

substantial value subsequently was discussed in the context of § 23(b)(4)).

Haley's invoice describes work that was done between new pole #1/92 and pole #1/97. Petitioner asserts, and the evidence indicates, that this work was done while Eversource's trench was open. The Eversource trench was only open for seven days, until May 17, however, and Haley charged the Town for 22 hours of additional work on May 18, 19 and 21. Petitioner's allegation that Haley's invoice was fraudulent focuses only on the charges for these 22 hours of work. Petitioner contends that Haley's invoice includes no description of the work purportedly done during these 22 hours, and that it is fraudulent because it includes charges for 22 hours more than Haley worked and for work by two laborers he did not hire or pay.

Charge for Haley's work

Haley tells us that, to bury overhead wires between a pole and Vanderhoop's shop, he, Jenkins and Addonizzio dug a new trench near the stairway up to the shop, put in handholds and underground piping for Comcast, Verizon and Eversource, and sank a pipe for the shop.

As to the charge for 22 hours of Haley's work from May 18 - 21, we are not persuaded that Petitioner has met the burden of proving that the work was not done. The evidence is scant, but two witnesses reported that Haley did work at that time and location. Dumas from Eversource said that Eversource did not do the work and that Haley did. Police Chief Belain saw Haley once working at a telephone box at the bottom of the stairs that lead up to the cliffs and the shops after the Eversource trench had been closed.

There was some evidence somewhat to the contrary, but it does not establish that Haley did not do the work. In May, 2018, Jay A. Smalley was the Highway Superintendent. He reports to the Select Board. At Haley's instruction before the work at Aquinnah Circle began, Smalley and his assistant picked up two truckloads of conduit at an electrical supplier in Vineyard Haven and dropped it off at 13 Aquinnah Circle, a storage area for the conduit. Among Smalley's duties are mowing, removal of trash and landscaping at Aquinnah Circle, and he also oversees maintenance of the public bathrooms there. After the Eversource trench was closed, Smalley did not recall or see Haley doing any work with respect to the electric lines at the lighthouse. At first, Smalley testified that he believed that Eversource did that work.

Smalley then appeared to concede that Haley did the work. He was asked the following "if/then" question,

"If Mr. Haley had been working up there, don't you think he was the guy that buried those wires?" Smalley answered, "Yes." Smalley also testified, however, that he had no idea who did that work and only assumed that Haley did it because Smalley had delivered conduit to Haley.

Overall, the most that Smalley's testimony proves is that he did not see Haley working at the second worksite and did not know whether Haley did the work there. It does not prove by a preponderance of the evidence that Haley did not install conduits in trenches to the lighthouse or up to Vanderhoop's shop.

Based on the evidence, we conclude that Petitioner has not proved that Haley did not do the work from May 18 - 21 or that the charge for those days was fraudulent. It is fair to say that if Haley did the work and failed to include a description of it in the invoice, then the invoice does misdescribe the work. We do not think such a failure rises to the level of a violation of § 23(b)(4) for submitting a fraudulent claim, however. Previous cases regarding § 23(b)(4) involved charges for work not performed or payments or other benefits obtained by misrepresentation or guile, and these have not been proven here. *See, e.g., Hyde*, 2014 SEC at 2544, 2548 (Southampton Fire Chief submitted sixteen payrolls totaling \$6,646 for hours and types of work that his son, a Southampton firefighter and emergency medical technician, had not performed), *In the Matter of John Caplis*, Final Order and Disposition Agreement, 2021 SEC -- (former Town of Templeton Director of Veterans Services submitted an invoice for \$484 to the Town for veterans' benefits, representing that it would be for "medical prescriptions" when real purpose was to enable a friend to get reimbursement for building permit fee), *In the Matter of Scott Chatigny*, Disposition Agreement, 2021 SEC ___ (Hubbardston police officer submitted higher-priced proposals to install a door and do roof repairs for the Town from a business that did not exist and signed them with a fictitious name so the Town would select lower-priced proposals from a company he owned).

Charge for work by two laborers

The laborers mentioned in the invoice are unidentified. Haley contends that they were Justina Jenkins and Charles Addonizzio and that they worked with him for the entire ten-day period mentioned in the invoice, including the final 22 hours. He asserts that he moved them from another job at a house on Lighthouse Road to help him at the Eversource trench. Petitioner argues that Jenkins and Addonizzio do not exist and did not do the work.

On the whole, while the evidence may not prove that

Jenkins and Addonizzio do not exist or were concocted, it raises significant questions about whether their existence is verifiable and whether they did the work for Haley at Aquinnah Circle. The only statements that Jenkins and/or Addonizzio worked at the site were made by Haley and contained in an Affidavit sent from the e-mail address, justinajenkins367@gmail.com, to Haley's attorney. For the following reasons, we find that Haley's testimony is not credible, and that the Affidavit of Justina Jenkins, which is hearsay, has insufficient indicia of reliability to give it any weight.

As to Haley, when he first was asked who worked with him at the Eversource trench, he claimed not to remember and then refused to say their names, but did not say why.

Records in evidence regarding payment by Haley to Jenkins and Addonizzio do not provide persuasive support that these two individuals did the work. The two 1099 forms, on their face, are unusual. There is no Social Security Number for either individual. Next, the amount paid to each individual, \$3,900, is the same amount that was charged for each laborer on the invoice Haley submitted to the Town. Haley testified that he paid Jenkins and Addonizzio cash, yet on the 1099 forms there are no additional amounts for the hours Haley said they worked at the house on Lighthouse Road just prior to work at the Eversource trench. These omissions raise questions about whether the 1099 forms that Haley produced are authentic or reliable.

Haley testified about an attempt he made to contact Jenkins during the course of these proceedings. On September 30, 2021, he e-mailed Kathleen Nash, a friend of Jenkins whom he had met at a friend's house, at a gmail address, kathleennash3277@gmail.com, but Google, in a letter responding to a subpoena from Petitioner, stated that it "does not have possession, custody or control of responsive documents for KATHLEENNASH3277@GMAIL.COM." This leads us to conclude that his attempt to reach Jenkins was fictitious, and again causes us to question Haley's credibility.

As for the Affidavit of Jenkins, it was obtained by Atty. Richard Gross after an exchange of e-mails with justinajenkins367@gmail.com. The first e-mail from justinajenkins367@gmail.com to Atty. Gross says that Jenkins had "been notified several times by Gary to give you a statement of my time working for him on Martha's Vineyard in 2018." Yet, Haley testified that he had had no communications with Jenkins after 2018. The contradiction between the two statements raises a question about which version is true and how the affiant was first contacted and by whom.

In addition, the affiant made significant efforts to be unavailable. The first e-mail also said that Jenkins and Chuck Addonizzio live "in Vermont on a farm off the grid" and that, with regard to Haley, they "don't want anything to do with this situation." Subsequent e-mails say that Jenkins would need to use a friend's cellphone to call Atty. Gross and go to the library to use a computer to sign an affidavit.

Atty. Gross has never spoken with or met Jenkins. Information that Petitioner obtained from Google suggests that the e-mail address, justinajenkins367@gmail.com, was created solely for the purpose of having the exchange of e-mails with Atty. Gross and never used again.⁶ The first log-in for the justinajenkins367@gmail.com e-mail address was on 10-07-2021 at 16:06:10 Z. Converted from Z, or Zulu or UTC, *time* to Eastern Daylight Savings Time, the time of the first log-in was 12:06 p.m. The first message from justinajenkins367@gmail.com to Atty. Gross was on 10-07-2021 at 12:49 p.m., within 45 minutes of the first log-in. An Affidavit with a typed signature for Justina Jenkins was sent from justinajenkins367@gmail.com to Atty. Gross on October 18, 2021, and Google shows no subsequent log-ins after that exchange.

The Affidavit of Justina Jenkins is hearsay, a statement made outside of the adjudicatory hearing offered for the purpose of proving the truth of its contents. Hearsay may be substantial evidence, provided that it has sufficient indicia of reliability. *Embers of Salisbury v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 530-531 (1988) (transcript of minor's testimony from her criminal trial had sufficient indicia of reliability to be considered by Alcoholic Beverages Control Commission in subsequent hearing regarding license of a bar where it was made in open court, under oath and subject to cross-examination). *Cf. Costa v. Fall River Housing Authority*, 71 Mass. App. Ct. 269, 281 (2008) (in a hearing about termination of a tenant's Federal subsidy assistance payments, housing authority improperly considered police report regarding tenant's arrest as police officer in effect testified "in absentia and beyond the reach of cross-examination"). The statements in the Affidavit of Justina Jenkins purportedly were made by an individual with whom no one but Haley claims to have spoken and under circumstances which were apparently intended to and did limit access to the affiant. Even the recipient of the Affidavit had no basis for verifying what person sent it.

At a State Ethics Commission hearing, all parties have the right to call and examine witnesses and to cross-examine witnesses who testify. 930 CMR 1.01(10)(f). Petitioner had no opportunity to inquire whether in fact

it was Justina Jenkins who provided the Affidavit or to cross-examine the affiant about its contents. Where the person sending e-mails from justinajenkins367@gmail.com deliberately was inaccessible and sought limited involvement in Haley's case, it is unrealistic to conclude that Petitioner could have subpoenaed the person if the Petitioner chose to do so. *Compare Embers*, 401 Mass. at 531. For these reasons, we give no weight to the Affidavit or the statements in it about what work Jenkins and/or Addonizzio did with Haley.

Still, since Petitioner has the burden of proving that the invoice was fraudulent, it is not enough to prove that the two unidentified laborers were not or might not be Jenkins and Addonizzio. Rather, Petitioner must show that no two laborers did the 22 hours of work charged in the invoice.

In this regard, there was evidence that Belain, Bettencourt and Dumas saw a male and a female with Haley at the Eversource trench. Officer Mathias saw only a female. Petitioner points to evidence that the female was Haley's niece, Kristina Metros. Haley told Dumas that the male and the female were Haley's relatives. Police Chief Belain saw Metros in work clothes digging with Haley and police officer Mathias also saw Metros wearing work clothes, and Bettencourt noted that a female at the site had "shaved hair," as Metros does. Belain and Mathias were present for hours during details and Bettencourt and Dumas were at the site once or twice a day doing work for Eversource. Petitioner urges us to conclude that Metros worked with Haley, but Haley did not pay her for the work, and that this therefore proves that the charge for at least one of the laborers mentioned in the invoice was fraudulent.

Petitioner's argument fails for two reasons. First, the logic upon which Petitioner's argument is based is flawed. A failure by Haley to pay his niece for work that she did would not lead to the conclusion that charges in Haley's invoice for the work by one laborer were fraudulent. Whether Haley paid a laborer for work or not may be a matter of concern to him and the laborer, but it does not make a difference as to whether Haley's invoice charged the Town for the value of work that was done for it. Rather, if the invoice charges for work done by a laborer, and Metros did the work, the logical conclusion would be that the charge for one laborer's work was not fraudulent. Consequently, to the extent that Petitioner challenges the charge in the invoice for at least one of the laborers, the female, Petitioner has the burden to prove that the 22 hours of work charged for that laborer was not done by anyone.

Second, as a factual matter, all of the reliable evidence

that witnesses saw other people with Haley is about his work at the Eversource site. Apart from Haley's assertion that two laborers assisted him with the 22 hours of work on May 18-21 at the second two trenches, there is no definitive eyewitness testimony to that effect.

Police Chief Belain was the only witness who was asked whether he saw laborers working with Haley at that time. He made contradictory statements from which we can draw no conclusion. He confirmed the accuracy of two affidavits dated August 17, 2021 and September 22, 2021, both drafted by Haley's attorney, in which he said that he had seen two workers with Haley at that time, but he also stated that "after I thought about it some more, I do not recall seeing those two."

In his brief, Haley asks us to conclude that Dumas saw two people working with Haley after the Eversource trench was closed, but Dumas was not asked whether he saw them then. His testimony about two people he saw is about the time when the Eversource trench was open.

The absence of evidence that anyone but Haley saw two laborers at the second worksite from May 18 - 21 does not prove by a preponderance of the evidence that one or the other of two laborers was not there, however. During those days, there were no police on detail and no one else was obligated to be present. Petitioner did not call any witness or otherwise present sufficient evidence proving that no one was with Haley during these days.

On the whole, the evidence does not persuade us that the 22 hours of work for which Haley included charges in his invoice was not delivered to the Town. Accordingly, we find that Petitioner has not proved by a preponderance of the evidence that the invoice Haley submitted to the Town was false or fraudulent.

IX. CONCLUSION

Petitioner has proved by a preponderance of the evidence that Haley violated § 19 when he participated as a Select Board member, first, in deciding that he would install the telecommunications conduits at Aquinnah Circle for the Town himself and, second, in approving the expense warrant which included his own invoice, when he had a financial interest in each of these particular matters. Petitioner has not proved by a preponderance of the evidence that Haley violated § 20 or § 23(b)(4) as alleged.

X. ORDER

Having concluded that Respondent Gary Haley violated § 19, and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** Gary Haley to pay a civil penalty of \$10,000 as follows: \$5,000 for his violation of § 19 by participating as a municipal employee in the decision that he would install telecommunications conduits at Aquinnah Circle for the Town himself, and \$5,000 for his violation of § 19 for participating as a municipal employee in approving the expense warrant that contained his own invoice.

DATE AUTHORIZED: October 14, 2022

DATE ISSUED: October 25, 2022

¹ G.L. c. 268B, § 4(i); 930 CMR 1.01(10)(o)(1).

² As we have found that Haley participated in the particular matter by deciding to install the conduits himself, our conclusion about this § 19 claim does not depend on whether Haley also effectively awarded himself a contract.

³ In the conflict of interest law, "municipal employee" is defined to include "a person performing services for... a municipal agency, ... whether serving with or without compensation. . ." G.L. c. 268A, § 1(g). Upon deciding for the Town that he would install the telecommunications conduits himself, Haley was a municipal employee both as an electrician for the Town and as a Select Board member, and he continued to participate in that decision in both capacities.

⁴ Along these lines, Madison testified that he paid Haley in accordance with G.L. c. 30B, § 8, which allows departure from usual procurement procedures to make emergency payments "(w)henever the time required to comply with a requirement of this chapter would endanger the health or safety of the people or their property." The statute requires a procurement officer to make a record of each emergency and to submit a copy of the record at the earliest possible time to the secretary of state. There was no evidence, however, that payment to Haley was actually made in accordance with this statute or that the record of an emergency payment required by the statute was created or filed.

⁵ Haley argues that payment for his work saved the Town money, but at least arguably his work cost the Town more than the value of his services. On top of Haley's unanticipated invoice, on July 3, 2018, Bettencourt submitted an invoice for \$12,881.50 to Madison, contending that Haley's delays at the

Eversource trench cost him money, and he threatened legal action if the invoice was not paid. Although Madison thought this was extortion, he reduced the amount to \$11,881.50 and put the invoice into the expense warrant process. When Bettencourt's bill came up at a Select Board meeting on September 5, 2018, Haley said, "we're all set with that," meaning, "Push it through for payment."

⁶ The second page of the Google Subscriber Information says, "Madison Information" and then "Madison Admin Information." At the hearing, Petitioner asked Madison if he had set up the Justina Jenkins gmail account, and Madison said no.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 22-0006**

**IN THE MATTER OF
BROOKE MERKIN**

Parties: John McDonald, Esq.
Counsel for Petitioner

Brooke Merkin, *pro se*

Commissioners: Maria J. Krokidas, Ch.
R. Marc Kantrowitz
Josefina Martinez
Wilbur P. Edwards, Jr.
Eron Hackshaw

Presiding Officer: Commissioner Wilbur P. Edwards, Jr.

FINAL ORDER

On September 15, 2022, the parties filed a Joint Motion to Dismiss ("Joint Motion") with a proposed Disposition Agreement requesting that the Commission approve the Disposition Agreement in settlement of the above-captioned matter and dismiss the adjudicatory proceeding. The Presiding Officer, Wilbur P. Edwards, Jr., referred the Joint Motion, with the Disposition Agreement, to the full Commission for deliberations on October 20, 2022.

In the proposed Disposition Agreement, Respondent Brooke Merkin, former Deskside Support Engineer for the Center for Health Information and Analysis ("CHIA") and part-time Service Desk Analyst for the

Executive Office of Technology Services and Security ("EOTSS"), admits that she violated G.L. c. 268A, §§ 7, 23(b)(2)(ii), and 23(b)(4).

Merkin admits that she violated § 7 when she, while a Deskside Support Engineer for CHIA, accepted a compensated part-time Service Desk Analyst position for EOTSS.¹

Merkin admits that she violated § 23(b)(2)(ii) when she used her official positions for CHIA and EOTSS to submit timesheets to and attempt to obtain pay from each agency for overlapping work hours, which would have resulted in her being paid more than \$1,200 for time she did not work.²

Merkin admits that she violated § 23(b)(4) by knowingly submitting separate timesheets to CHIA and EOTSS reporting to each agency that she worked the same 31 hours and claiming payment for those hours.³

The Respondent agrees to pay a civil penalty of \$2,500 and to waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the Disposition Agreement in this and any other administrative or judicial proceeding to which the Commission is or may be a party.

In support of the Joint Motion, the parties assert that this matter would be fairly and equitably resolved by the terms set forth in the Disposition Agreement and that this resolution would obviate the need for a hearing on any factual issues, saving time and resources for all involved. The parties assert that the interests of justice, the parties and the Commission will be served by the settlement of this matter.

On October 20, 2022, the Commission voted to allow the Joint Motion and accept the proposed Disposition Agreement provided that corrections were made to pages 3, 4, and 6 of the Disposition Agreement. On October 27, 2022, the parties filed a revised and signed Disposition Agreement, reflecting the corrections.

WHEREFORE, the Commission hereby **ALLOWS** the Joint Motion and accepts the revised Disposition Agreement filed by the parties on October 27, 2022. Respondent's tendered payment of the \$2,500 civil penalty for violating G.L. c. 268A, §§ 7, 23(b)(2)(ii), and 23(b)(4) is accepted. Commission Adjudicatory Docket No. 22-0006, *In the Matter of Brooke Merkin* is **DISMISSED**.

DATE AUTHORIZED: October 20, 2022
DATE ISSUED: October 31, 2022

¹ G.L. c. 268A, § 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the Commonwealth or a state agency is an interested party, of which interest the state employee has knowledge or has reason to know.

² G.L. c. 268A, § 23(b)(2)(ii) prohibits a state employee from knowingly, or with reason to know, using or attempting to use her official position to secure for herself or others an unwarranted privilege or exemption of substantial value which is not properly available to similarly situated individuals. *See In the Matter of Frederick Foresteire*, 2009 SEC 2220 (substantial value is \$50 or more for purposes of § 23(b)(2) claim).

³ G.L. c. 268A, § 23(b)(4) prohibits a state employee from, knowingly or with reason to know, presenting a false or fraudulent claim to her employer for any payment or benefit of substantial value (\$50 or more).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 22-0006**

**IN THE MATTER OF
BROOKE MERKIN**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Brooke Merkin ("Merkin") enter into this Disposition Agreement pursuant to Section 3 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On July 29, 2021, pursuant to G.L. c. 268B § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Merkin. On January 19, 2022, the Commission concluded its inquiry and found reasonable cause to believe that Merkin violated G.L. c. 268A, § 7 and § 23 (b)(2)(ii) and (b)(4).

The Commission and Merkin now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. On January 25, 2021, Merkin began employment with the Center for Health Information and Analysis ("CHIA") as a full-time Deskside Support Engineer. She was scheduled to work at CHIA Monday through Friday from 8:45 a.m. to 5:00 p.m.

2. On February 16, 2021, Merkin began employment with the Executive Office of Technology Services and Security ("EOTSS") as a part-time Service Desk Analyst. She was scheduled to work at EOTSS on Saturdays, Sundays, and Mondays from 7:00 a.m. to 3:00 p.m.

3. CHIA and EOTSS are both agencies of the Commonwealth of Massachusetts.

4. Merkin primarily worked remotely in both positions.

5. Merkin held the paid positions at CHIA and EOTSS simultaneously without either agency's approval or awareness.

6. Between February 19, 2021, and March 1, 2021, Merkin sought payment from the Commonwealth for working both the CHIA position and the EOTSS position during the same hours, for a total of 31 overlapping hours.

7. After CHIA and EOTSS discovered Merkin had submitted timesheets in both positions for the same hours, the agencies withheld payment for 14.5 of those hours and deducted the amount already paid to Merkin for 16.5 of the hours from her final paycheck.

8. The 31 overlapping hours Merkin claimed would have resulted in an unearned and undue payment to her of over \$1,200 had the double billing not been identified.

9. Merkin knew she submitted to CHIA and EOTSS timesheets for 31 hours that overlapped and knowingly gave false excuses to CHIA for her unavailability during hours when she was working for EOTSS. On February 19, 2021, she told her manager at CHIA that she could not work a full day due to an internet outage at her home. She was approved to work the remainder of the day using her cell phone. Later that day, she claimed mice had chewed through her internet cables. She submitted timesheets to both CHIA and EOTSS

falsely reporting 6 hours worked for each agency, between 9:00 a.m. and 3:00 p.m., on February 19, 2021.

10. Merkin attempted to resign her positions at CHIA and EOTSS in the beginning of March 2021. Neither agency accepted her resignation and both terminated her employment.

Conclusions of Law

11. Both as an employee of CHIA and as an employee of EOTSS, Merkin was, at all relevant times, a state employee as that term is defined in G.L. c. 268A, § 1(q).

Section 7 Violation

12. Section 7 of G.L. c. 268A prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency in which the Commonwealth or a state agency is an interested party, of which interest she has knowledge or has reason to know. A state employee who has an additional, compensated position with a state agency has financial interest in such a contract.

13. Once Merkin, a state employee at CHIA, accepted the paid part-time Service Desk Analyst position at EOTSS, she became a state employee who had a financial interest in a contract made by a state agency in which the agency was a party and had a direct and substantial interest.

14. Merkin knew she had a financial interest in her EOTSS employment contract given that her employment with that agency was compensated.

15. By, while a state employee of CHIA, entering into paid part-time employment with EOTSS, Merkin had a financial interest in a contract made by a state agency in which the agency was an interested party, of which interest she has knowledge or has reason to know. By so doing, Merkin violated G.L. c. 268A, § 7.

Section 23(b)(2)(ii) Violation

16. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a state employee from knowingly, or with reason to know, using or attempting to use her official position to secure for herself unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals. Pursuant to G.L. c. 268A, § 23(f), Commission regulation 930 C.M.R. 5.05 defines substantial value as \$50 or more.

17. It is an unwarranted privilege of substantial value that is not properly available to similarly situated individuals for a state employee to receive pay, totaling \$50 or more, from each of two state agencies for work hours during which the employee is separately employed by each agency to work exclusively for that agency.

18. By, as a CHIA employee and as a EOTSS employee, submitting timesheets respectively to CHIA and EOTSS for overlapping work hours in an attempt to obtain pay from each agency for the same hours, which would have resulted in her being paid more than \$1,200 for time she did not work, Merkin knowingly used her official positions to secure for herself a substantially valuable unwarranted privilege which was not properly available to similarly situated individuals. By so doing, Merkin violated G. L. c. 268A, § 23(b)(2)(ii).

Section 23(b)(4) Violation

19. Section 23(b)(4) prohibits a public employee from knowingly, or with reason to know, presenting a false or fraudulent claim to her employer for any payment or benefit of substantial value.

20. Both as an employee of CHIA and as an employee of EOTSS, Merkin was employed by the Commonwealth of Massachusetts.

21. The timesheets Merkin submitted in each of her state positions were each claims presented to her public employer for a payment of substantial value.

22. Merkin knowingly submitted false or fraudulent claims for payment when she submitted separate timesheets to CHIA and EOTSS reporting to each agency that she had worked the same 31 hours.

23. By, as an employee of CHIA and as an employee of EOTSS, knowingly submitting separate claims to both agencies for payment for the same work hours, Merkin presented a false or fraudulent claims to her employer, the Commonwealth, for payments of substantial value. In so doing, Merkin violated G.L. c. 268A, § 23(b)(4).

Resolution

In view of the foregoing violations of G.L. c. 268A by Merkin, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Merkin:

- (1) that Merkin pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$2,500 as a civil penalty for violating G.L. c. 268A, §§ 7, 23(b)(2)(ii) and 23(b)(4); and
- (2) that Merkin waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE ISSUED: October 31, 2022

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 22-0008**

**IN THE MATTER OF
CHRISTINE EMERSON**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Christine Emerson ("Emerson") enter into this Disposition Agreement pursuant to Section 3 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On January 21, 2022, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a), into possible violations of the conflict of interest law, G.L. c. 268A, by Emerson. On July 26, 2022, the Commission concluded its inquiry and found reasonable cause to believe that Emerson violated G.L. c. 268A, §§ 19, 23(b)(2), and 23(b)(3).

The Commission and Emerson now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. Emerson was at all relevant times the elected Town Clerk for the Town of Cheshire ("Town Clerk").

Hiring of her daughter

2. As Town Clerk, Emerson was responsible for conducting the annual Town Census.

3. For nine years between 2008 and 2020, Emerson, as Town Clerk, hired her daughter to compile mailings for the annual Town Census.

4. At no point during that timeframe, did Emerson post a position or otherwise give public notice of the opportunity to compile mailings for the annual Town Census. Instead, Emerson asked her daughter to help and paid her to do so.

5. Each year, Emerson, as Town Clerk, created, signed, and submitted her daughter's pay vouchers to the Town Treasurer for payment.

6. Each year, Emerson determined her daughter's rate of pay.

7. Emerson determined that her daughter would be paid per envelope.

8. In 2008, Emerson paid her daughter 42 cents per envelope for 1650 envelopes, for a total of \$693. In most of the following years, Emerson increased this compensation amount by around 2%. In 2020, Emerson paid her daughter a total of \$911.63.

9. The Town paid Emerson's daughter a total of \$7,897 for her census mailings compilation work between 2008 and 2020.

Hiring of her granddaughter

10. As Town Clerk, Emerson was responsible for the general conduct of elections.

11. For seven elections between 2014 and 2020, Emerson hired her granddaughter to help set up the polling location on the day of the election.

12. In 2020, Emerson hired her granddaughter for an additional seventy total hours to help prepare paperwork for multiple elections and to help with early voting and extra precautions related to COVID-19.

13. Emerson did not post a position or otherwise give public notice of the opportunity to assist with the polling location set up or election paperwork. Instead, she asked her granddaughter to help and paid her to do so.

14. Emerson created, signed, and submitted her granddaughter's pay vouchers to the Town Treasurer for payment after each election.

15. Emerson set her granddaughter's rate of pay at \$25 per poll set up for each election between 2014 and 2020, and set her hourly rate for election-related work in 2020 at \$12.75 per hour, the state hourly minimum wage at the time.

16. In 2021, Emerson hired her granddaughter to compile mailings for the annual Town Census without posting or giving public notice of the opportunity to do this paid work.

17. Emerson, as Town Clerk, created, signed, and submitted her granddaughter's census work pay voucher to the Town Treasurer for payment.

18. Emerson, as Town Clerk, determined that her granddaughter would be paid per envelope, for a total of \$911.63, for the census compilation work in 2021.

19. The Town paid Emerson's granddaughter a total of \$2,038.13 for her election and census compilation work between 2014 and 2020.

Hiring a voter registrar in 2022

20. In 2022, after she was warned not to hire family members, Emerson hired a voter registrar to assist with compiling the annual Town Census.

21. Emerson determined that the voter registrar completed approximately six and one half hours of work stuffing envelopes for the Town Census, while Emerson herself performed the preliminary mailing compilation work in approximately sixteen and one half hours, for a combined total of approximately 23 hours of work.

22. Emerson, as Town Clerk, created, signed, and submitted the voter registrar's pay voucher to the Town Treasurer for payment.

23. Emerson set the voter registrar's rate of pay at \$14.25, the state hourly minimum wage at the time. As a result, the registrar was paid a total of \$92.63 for her census work.

24. Had Emerson paid her daughter and her granddaughter for their census work at a rate of \$14.25 per hour for approximately 23 hours' worth of work, they would have earned a total of approximately \$330 each year for their census work. Instead, because Emerson, as Town Clerk, decided that they would be paid per envelope rather than by the hour, her daughter was paid between \$693 and \$911.63 each year she did census work, which was effectively the equivalent of between \$30 and \$39 per hour, and her granddaughter

was paid the effective equivalent of over \$39 per hour for her 2021 census work.

Conclusions of Law

Section 19

25. General Laws chapter 268A prohibits a municipal employee from participating as such an employee in a particular matter in which, to their knowledge, they or an immediate family member has a financial interest.

26. As Town Clerk, Emerson was, at all relevant times, a municipal employee as defined in G.L. c. 268A, § 1(g).

27. Emerson's daughter is a member of her immediate family, as defined by G.L. c. 268A, § 1(e).

28. Each decision to hire her daughter to perform compensated census compilation work to the Town, to determine her daughter's rate of pay, and to create, sign, and submit her daughter's pay vouchers for payment by the Town, was a particular matter in which Emerson's daughter had a financial interest.

29. When Emerson participated as Town Clerk in the particular matters of her daughter's hiring and compensation as described above, she knew her daughter had a financial interest in those matters.

30. Therefore, by, as Town Clerk, hiring her daughter to provide compensated census compilation work to the Town of Cheshire on nine occasions, determining her daughter's rate of pay, and creating, signing, and submitting her daughter's pay vouchers, Emerson repeatedly violated § 19.

Section 23(b)(3)

31. Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from, knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

32. By repeatedly hiring her granddaughter to perform compensated election-related work for the Town, as well as the 2021 annual Town Census compilation work, determining her granddaughter's rate of pay, and creating, signing, and submitting her granddaughter's pay vouchers for payment by the Town, Emerson

knowingly or with reason to know acted in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Emerson's granddaughter could unduly enjoy Emerson's favor in the performance of her official duties as Town Clerk.

33. By so acting, Emerson repeatedly violated § 23(b)(3).

Section 23(b)(2)

34. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a public employee from knowingly or with reason to know using, or attempting to use, their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not otherwise properly available to similarly situated individuals.

35. The opportunity to be paid per envelope, at a minimum rate of 42 cents per envelope, for census mailings compilation work was a privilege for Emerson's daughter and granddaughter.

36. The privilege was unwarranted because it resulted in Emerson's daughter and granddaughter being paid significantly more for their work than they would have earned if they had been paid the hourly minimum wage, the amount paid for the same work to a non-family member.

37. Emerson used her official position as Town Clerk to secure this unwarranted privilege for her daughter and granddaughter by as Town Clerk determining their rate of pay each year.

38. The unwarranted privilege was of substantial value because it resulted in Emerson's daughter and granddaughter being paid well over \$50¹ more than they would have received had they been paid the same hourly rate the voter registrar was paid.

39. The unwarranted privilege was not properly available to any Town employee, and was not, in fact, available to the voter registrar who was paid minimum wage for performing the same work in 2022.

40. Therefore, by, as Town Clerk, setting the pay rate for her daughter and granddaughter at a minimum of 42 cents per envelope, Emerson, knowingly or with reason to know, used her official position to secure for her daughter and granddaughter an unwarranted privilege of substantial value not properly available to similarly

situated individuals. In doing so, Emerson violated § 23(b)(2)(ii).

Disposition

In view of the foregoing violations of G.L. c. 268A by Emerson, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by Emerson:

- (1) that Emerson pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$5,000 as a civil penalty for violating G.L. c. 268A, §§ 19, 23(b)(2), and 23(b)(3); and
- (2) that Emerson waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE ISSUED: November 17, 2022

¹ Substantial value is \$50 or more. 930 CMR 5.05.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 22-0009**

**IN THE MATTER OF
ROBERT GRAY**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Robert Gray ("Gray") enter into this Disposition Agreement pursuant to Section 3 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On October 20, 2021, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a),

into possible violations of the conflict of interest law, G.L. c. 268A, by Gray. On September 8, 2022, the Commission concluded its inquiry and found reasonable cause to believe that Gray violated G.L. c. 268A, § 23(b)(2), and 23(b)(4).

The Commission and Gray now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. Gray was at all relevant times a Project Engineer for the Commonwealth's Division of Capital Asset Management and Maintenance ("DCAMM").

2. In 2020 and 2021, Gray was assigned to projects at the Massachusetts State Public Health Laboratory ("State Lab") in Jamaica Plain.

3. DCAMM policy at the time allowed employees to use rental cars, under DCAMM's contract with Enterprise Rent-A-Car ("Enterprise"), for travel to jobsites, or to obtain reimbursement for miles traveled in their personal vehicle.

4. Under its contract with Enterprise, DCAMM paid a flat daily rate for rental cars, with no additional mileage charge.

5. Under DCAMM's rental car policy, rental cars were to be used only for work purposes.

6. In January 2017, Gray received a written warning from DCAMM that rental cars were to be used only for work purposes and were not for personal use or convenience.

7. Between March 7, 2020 and March 18, 2021, Gray obtained a rental car under DCAMM's contract with Enterprise on 53 occasions. The vast majority of these rentals were for single Sunday through Saturday or Saturday through Saturday periods. Gray used a rental car for 16 consecutive days between December 26, 2020 and January 11, 2021, and again for 18 consecutive days between February 28, 2021 and March 18, 2021.

8. During the relevant time, DCAMM employees were able to reserve a rental car directly through DCAMM's finance office.

9. Gray's supervisor approved him having a weekly rental car for a limited period of five weeks during the spring of 2020 where Gray's job duties required more frequent visits to the State Lab jobsite.

10. Otherwise, Gray reserved rental cars directly through DCAMM's finance office without his supervisor's approval.

11. For the majority of the 53 rentals between March 7, 2020 and March 18, 2021, Gray obtained the rental cars knowing that he would use the vehicles for a personal, non-work purpose for at least part of the rental period.

12. Other than the limited period during spring 2020, Gray did not have a work-related need for a rental car on a weekly basis and did not visit the State Lab job site daily.

13. On 85 of the 288 calendar days on which Gray had a rental car in his possession, Gray did not record any work time.

14. Gray had a rental car in his possession on at least 40 full days which were weekend days, holidays, or days on which he used personal, vacation, or sick leave.

15. Under the DCAMM rental policy in effect at the time, Gray was approved to use DCAMM's rental cars to travel between his home and his jobsite, as well as to DCAMM's offices in Boston. The distance between his home and his jobsite at the State Lab was approximately 30 miles. The distance between his State Lab jobsite and DCAMM's offices was approximately 6 miles.

16. In each of 20 of his 53 rental car use periods, Gray drove over 500 miles. In each of eight of those rental car use periods, Gray drove over 1,000 miles.

17. Between May 23, 2020, and May 29, 2020, which included Memorial Day weekend, Gray drove a rental car he obtained as a DCAMM employee 1,355 miles despite logging only four DCAMM work days during that period.

18. Between December 26, 2020, and January 11, 2021, Gray drove a rental car he obtained as a DCAMM employee 2,166 miles despite logging only eight DCAMM work days during that period.

19. On at least three occasions, Gray informed DCAMM's finance office that he would be picking up a rental car for the work week when in fact he had already picked up the car the weekend before.

20. DCAMM estimated the value of Gray's personal use of its rental cars to be \$6,348.46. Gray agreed to DCAMM's deduction of \$6,348.46 from his accrued

vacation time payout upon his retirement to return the value of his personal use of the rental cars to DCAMM.

Conclusions of Law

21. As a DCAMM Project Engineer, Gray was a state employee as that term is defined in G.L. c. 268A, § 1(g).

Section 23(b)(2)

22. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a public employee from knowingly, or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not otherwise properly available to similarly situated individuals.

23. Gray's unauthorized use for non-work purposes of rental cars paid for by DCAMM was an unwarranted privilege that was not properly available to any state employee.

24. The unwarranted privilege was of substantial value because Gray's use for non-work purposes of rental cars paid for by DCAMM was worth well over \$50.¹

25. Therefore, by, as DCAMM Project Engineer, knowingly using his official position to obtain rental cars paid for by DCAMM for weeklong periods without a work-related need and by using the rental cars for his personal, non-work purposes, Gray knowingly or with reason to know, used his official position to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals. In doing so, Gray violated G.L. c.268A, § 23(b)(2)(ii).

Section 23(b)(4)

26. Section 23(b)(4) of G.L. c. 268A prohibits public employees from knowingly, or with reason to know, presenting a false or fraudulent claim to his employer for any payment or benefit of substantial value.

27. As a DCAMM Project Engineer, Gray was an employee of DCAMM and DCAMM was his employer within the meaning of § 23(b)(4).

28. Gray knowingly, or with reason to know, presented a false and fraudulent claim for a benefit of substantial value to his employer, DCAMM, each time he requested a car rental through DCAMM's finance office with knowledge or reason to know that he intended to or would use the vehicle for non-work

purposes. By so doing, Gray violated G.L. c. 268A, § 23(b)(4).

Disposition

In view of the foregoing violations of G.L. c. 268A by Gray, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the following terms and conditions agreed to by Gray:

- (1) that Gray pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$5,000 as a civil penalty for violating G.L. c. 268A, §§ 23(b)(2), and 23(b)(4); and
- (2) that Gray waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE ISSUED: November 17, 2022

¹ Substantial value is \$50 or more. 930 CMR 5.05.

ADVICE



EDUCATION



DISCLOSURE



ENFORCEMENT

**STATE
ETHICS
COMMISSION**



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**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
One Ashburton Place, Room 619
Boston, MA 02108**