

ADVICE



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ENFORCEMENT

# 2014 Advisory Opinions Enforcement Actions

**MASSACHUSETTS STATE ETHICS COMMISSION**

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Included in this publication are:

**State Ethics Commission Advisory issued in 2014**

Cite Conflict of Interest Advisories as follows: Advisory-14-(number).

**State Ethics Commission Decisions and Orders and Disposition Agreements issued in 2014**

Cite Enforcement Actions by name of respondent, year, and page, as follows:

*In the Matter of John Doe*, 2014 SEC (page number).

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

**State Ethics Commission**  
**Advisory Opinion and Advisories**  
**2014**

**Advisory 14-1:** Public Employees' Private Business Relationships And Other Private Dealings With Those Over Whom They Have Official Authority Or With Whom They Have Official Dealings ..... 916



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**ADVISORY 14-1: PUBLIC EMPLOYEES' PRIVATE BUSINESS RELATIONSHIPS AND OTHER PRIVATE DEALINGS WITH THOSE OVER WHOM THEY HAVE OFFICIAL AUTHORITY OR WITH WHOM THEY HAVE OFFICIAL DEALINGS**

**Introduction**

G.L. c. 268A, § 23 prohibits the acceptance by a public employee of anything worth \$50 or more that was given because of the public employee's official position,<sup>1</sup> and also prohibits the use by a public employee of his official position to obtain unwarranted privileges worth \$50 or more.<sup>2</sup> In addition, this section of the law prohibits a public employee from acting in a manner which would cause a reasonable person to conclude that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties.<sup>3</sup>

The Commission has long interpreted this section of the law as restricting the ability of public employees to engage in private business relationships or other private dealings with persons over whom they have official authority or with whom they have official dealings. In numerous opinions over the past thirty years, the Commission has concluded that such private business relationships and other private dealings are inherently coercive, and therefore violate § 23(b)(2), because the person or entity under the public employee's official authority, or with whom the public employee has official dealings, may not feel free to decline to enter into a private business relationship, or may feel obliged to give the public employee favorable treatment. In addition, the public employee's impartiality in performing his official duties, when those duties involve or affect those with whom he has a private business relationship or other private dealings, may appear to be compromised, in violation of § 23(b)(3).<sup>4</sup>

The most common types of private business relationships and private dealings that have resulted in the Commission finding violations or potential violations of §§ 23(b)(2) and 23(b)(3) are those in which public employees have asked someone under their official authority, or with whom they were having official dealings, to do any of the following: privately work for or provide services to them; buy goods or services from them; give them (or someone else) paid employment; give or lend them money; donate to a private cause; give them special or favorable treatment in making a purchase; or buy,

sell, or rent real estate. This list is not exhaustive. Examples of private business relationships and private dealings where the Commission has found violations of §§ 23(b)(2) and/or 23(b)(3), or has advised a public employee to avoid a violation of those sections, are set forth in the bullet points in Part I below.

In certain circumstances, where certain safeguards are present, private business relationships and other private dealings between public employees and those under their official authority or with whom they have official dealings are permissible. Specifically, such private business relationships and other private dealings are permissible under §§ 23(b)(2) and 23(b)(3) only when: (1) the private business relationship or other private dealing is initiated by the person or entity under the public employee's authority, or with whom the public employee has or expects to have official dealings, and not by the public employee; (2) the private business relationship or other private dealing is entirely voluntary; (3) the private business relationship or other private dealing does not involve special or favorable treatment given to the public employee because of his official position; and (4) the private business relationship or other private dealing is disclosed publicly in writing by the public employee.<sup>5</sup> This Advisory explains when these restrictions apply (Part I) and how to comply with them (Part II).

The conflict of interest law does not prohibit public employees from engaging in ordinary retail transactions, where the purchase price and other terms are fixed, published and available to any member of the public. For example, a selectman who participates in the issuance of common victualler and alcoholic beverage licenses to restaurants may patronize restaurants licensed by his board, order from their menus, and pay the menu price, without raising any issue under the conflict of interest law. If, however, the selectman wished to approach a restaurant licensed by his board to negotiate the terms on which the restaurant would cater a private event, he would need to comply with the restrictions noted above and explained in more detail below.

**I. What Constitutes "Official Authority" or "Official Dealings"?**

This section of this Advisory summarizes Commission enforcement actions and advisory opinions where the Commission has either found a violation of §§ 23(b)(2) and/or 23(b)(3), or has advised on how a violation may be avoided, to illustrate what constitutes "official authority" and

“official dealings.” “Official authority” and “official dealings” are not mutually exclusive. A public employee may have official authority over someone with whom he is also having official dealings (for example, the Executive Director of a Housing Authority has official authority over all applicants for public housing from his agency, and may have official dealings with some applicants if he handles their applications personally). A public employee may have official authority over someone with whom she has no official dealings (the head of an agency has official authority over all agency employees, including those managed by her subordinates with whom she has no contact); or may have official dealings with someone over whom he has no official authority (for example, by responding to a request for information by a member of the public). This Advisory uses the terms “official authority” and “official dealings” to summarize the kinds of situations in which public employees’ positions give them power over others. In the enforcement actions and advisory opinions summarized below, the Commission found that public employees had power over others arising from their official authority over them, their official dealings with them, or some combination of the two, such that a private business relationship or other private dealing was subject to the restrictions of §§ 23(b)(2) and 23(b)(3).

#### **A. Official Authority**

A public employee does not have official authority over every person or entity with whom her public agency has contact. In past enforcement actions and advisory opinions, the Commission has concluded that particular public employees had official authority over the following persons or entities: their subordinates and those managed by their subordinates; vendors and consultants whose contracts they or their subordinates managed; recipients of public benefits from a program administered by the public employee’s agency who were within the geographic area where the public employee worked; inmates in custody at facilities where the public employee worked; persons and entities granted permits or licenses by a board on which the public employee serves as a member; and persons and entities subject to the public employee’s official inspection.<sup>6</sup> When a public employee has official authority over a person or entity, her private business relationships and other private dealings with that person or entity are subject to the restrictions of G.L. c. 268A, §§ 23(b)(2) and 23(b)(3).

**Subordinates.** A public employee’s immediate subordinates, as well as their subordinates, are under

the public employee’s official authority.<sup>7</sup> By contrast, other employees of the same agency who are not supervised even indirectly by the public employee generally are not under the public employee’s official authority. Below are some examples of Commission precedent regarding the application of §§ 23(b)(2) and 23(b)(3) to private business relationships and other private dealings with public employees’ subordinates.

- The Chair of a municipal college Board of Governors violated § 23(b)(2) by asking her subordinate, the college President, to consider hiring her brother.<sup>8</sup>
- A School Committee member violated §§ 23(b)(2) and 23(b)(3) by obtaining a private agreement concerning reimbursement of expenses from the Superintendent, his subordinate.<sup>9</sup>
- A Superintendent of Schools violated § 23(b)(2) by permitting the School Department’s Maintenance Manager to arrange for the School Department plumber to work on the bathrooms and kitchen at the Superintendent’s house.<sup>10</sup>
- A municipal building inspector violated §§ 23(b)(2) and 23(b)(3) by obtaining free services (moving a dishwasher and plowing snow) from subordinate building inspectors.<sup>11</sup>
- A municipal Department of Public Works Commissioner violated §§ 23(b)(2) and 23(b)(3) by borrowing money from a direct subordinate.<sup>12</sup>
- A legislative aide to a member of the General Court was advised that he could engage in compensated campaign work for his direct supervisor only subject to the restrictions of §§ 23(b)(2) and 23(b)(3).<sup>13</sup>
- A Sheriff violated § 23(b)(3) by hiring and paying jail maintenance employees to construct a tennis court fence at his private residence, and by using a jail employee to move refrigerators to and from his summer home in Maine.<sup>14</sup>
- A Superintendent of Schools violated § 23(b)(3) by borrowing \$5,000 from a teacher subject to his supervisory authority and \$3,000 from an employee of the school department.<sup>15</sup>

**Vendors or Consultants to a Public Agency.** A vendor or consultant whose contract is managed by the public employee or by his subordinates is under

the public employee's official authority.<sup>16</sup> By contrast, vendors to an agency who do not deal with a particular public employee or any of his subordinates are not under that public employee's official authority. Below are some examples of Commission precedent regarding the application of §§ 23(b)(2) and 23(b)(3) to public employees' private business relationships and other private dealings with vendors or consultants whose contracts they or their subordinates managed. As noted above, public employees are not prohibited by the conflict of interest law from engaging in ordinary retail transactions, where the purchase price and other terms are fixed, published and available to any member of the public.

- A Sheriff's Department Fleet Supervisor violated §§ 23(b)(2) and 23(b)(3) by telling a vendor of vehicles and equipment from whom he purchased vehicle equipment in his Fleet Supervisor position that he wanted to purchase a used car, and subsequently obtaining a used car for his personal use from the vendor.<sup>17</sup>

- The Speaker of the House of Representatives violated § 23(b)(3) by participating in various private transactions with a vendor who did work for his office without disclosing the fact that he was doing so.<sup>18</sup>

- The head of a public agency was advised that § 23(b)(2) prohibited him from inviting agency vendors to participate in campaign-related events.<sup>19</sup>

- A County Commissioner was advised that § 23(b)(2) prohibited him from soliciting private insurance business from county vendors.<sup>20</sup>

- The Mayor of Boston was advised in a public compliance letter that he should not have permitted private individuals and businesses that did business with the City to be asked to contribute money for a birthday party for his wife, pursuant to § 23.<sup>21</sup>

**Recipients of Public Benefits from Programs Administered by Public Agencies.** A public employee who works for a public agency that provides public benefits has official authority over recipients of those benefits within the geographic area in which the public employee works, but not over recipients of benefits from the same agency in different geographic areas. For example:

- The Executive Director of a Housing Authority violated § 23(b)(2) by privately negotiating to purchase a house (later purchased by his father) from persons applying for a housing unit from his agency.<sup>22</sup>

- Employees of the state Department of Public Welfare were advised that §§ 23(b)(2) and 23(b)(3) prohibited them from privately renting property to recipients of public assistance benefits in the geographic area in which they worked, but would not prohibit them from privately renting property to Department clients who resided outside that area.<sup>23</sup>

- An employee of the state Department of Mental Health (DMH) was advised that §§ 23(b)(2) and 23(b)(3) would prohibit him from selling household products privately to his DMH clients or their family members, but would not prohibit him from selling products to DMH clients with whom he had no official contact, provided that he did not use his position as leverage to encourage purchases.<sup>24</sup>

**Persons In Custody.** Persons who are in the custody of a public agency and are being held in a facility where a public employee works are under the public employee's official authority. For example:

- A correction officer violated §§ 23(b)(2) and 23(b)(3) by purchasing a house from an inmate at the facility where the officer worked.<sup>25</sup>

- A senior correction officer was advised that his distribution to inmates at his facility of mail order catalogs offering products for sale, and for the sale of which he would receive a commission, was prohibited by § 23.<sup>26</sup>

**Permittees and Licensees.** Where a public employee is a member of a permitting or licensing board, the permitted or licensed professionals or entities are under his official authority. Below are some examples of Commission precedent regarding the application of §§ 23(b)(2) and 23(b)(3) to public employees' private business relationships and other private dealings with licensees. As noted above, public employees are not prohibited by the conflict of interest law from engaging in ordinary retail transactions, where the purchase price and other terms are fixed, published and available to any member of the public.

- A member of a municipal Board of Health with authority over potable water supplies, which

could approve building permits based on well water sample results, violated §§ 23(b)(2) and 23(b)(3) by attempting to make a private sale of a water filtration system to a person seeking approval of a building permit from his Board.<sup>27</sup>

- A member of a municipal liquor licensing board violated §§ 23(b)(2) and 23(b)(3) by approaching package stores licensed by his board to persuade them to continue buying ice from his own private company.<sup>28</sup>

- A member of a municipal liquor licensing board who was also a real estate broker violated §§ 23(b)(2) and 23(b)(3) by approaching the owner of a business licensed by his board to obtain an exclusive real estate listing.<sup>29</sup>

**Persons and Entities Subject to Inspection.** A public employee who has authority to inspect businesses and premises has official authority over those subject to his inspection power. By contrast, a clerical or support staff employee of a public agency does not have official authority over persons and businesses subject to her agency's inspection power. Below are some examples of Commission precedent regarding the application of §§ 23(b)(2) and 23(b)(3) to public employees' private business relationships and other private dealings with persons and entities subject to their inspection. As noted above, public employees are not prohibited by the conflict of interest law from engaging in ordinary retail transactions, where the purchase price and other terms are fixed, published and available to any member of the public.

- A municipal building inspector violated §§ 23(b)(2) and 23(b)(3) by asking a contractor subject to his authority as an inspector to replace his personal mailbox and plow snow from his driveway.<sup>30</sup>

- A municipal health agent violated §§ 23(b)(2) and 23(b)(3) by seeking a "referral fee" for his assistance in helping to sell a property on which he had observed a percolation test for the seller.<sup>31</sup>

- A Fire Chief with inspection power over new construction violated § 23(b)(2) by seeking private drywall construction work from a developer subject to his inspection power.<sup>32</sup>

- A Department of Public Utilities inspector of commercial vehicles violated §§ 23(b)(2) and 23(b)(3) by soliciting private work from tow

truck operators over whom he had inspection authority.<sup>33</sup>

## **B. Official Dealings**

Even when a public employee does not have official authority over someone by reason of her public agency's organizational structure, the public employee may be able to obtain an advantage in a private business relationship or other private dealing with a person or entity if she has, or expects to have, official dealings with that person or entity. The public employee's power to affect that person or entity in the context of their official dealings makes such situations inherently coercive. Thus, the Commission generally will find that the restrictions of §§ 23(b)(2) and 23(b)(3) apply in situations where a public employee seeks to enter a private business relationship or engage in some other private dealing with someone at a time when that person or entity may be directly and significantly affected by the public employee's actions.<sup>34</sup> For example:

- A member of the Board of Registration in Pharmacy violated § 23(b)(2) by approaching a pharmaceutical provider that had matters pending before his Board on behalf of a private client.<sup>35</sup>

- A Sheriff violated §§ 23(b)(2) and 23(b)(3) by asking a person on whom he was serving process in his role as Sheriff to sell him her property.<sup>36</sup>

- A State Representative violated § 23(b)(2) by requesting that a bank donate to a non-profit entity during a meeting at which the Representative was introduced to bank employees as the co-chair of the Joint Committee on Banks and Banking, and during a time period when the banking committee was addressing a variety of matters affecting banks.<sup>37</sup>

- A municipal Department of Public Works Associate Commissioner responsible for operation of the municipal cemetery violated §§ 23(b)(2) and 23(b)(3) by obtaining "loans" from funeral home directors with whom he regularly dealt in arranging burial services.<sup>38</sup>

- A police officer who was also president of a voluntary police association was advised that § 23(b)(2) would prohibit officers soliciting donations for the association from implying that a decision whether or not to donate could affect the timing or quality of police services.<sup>39</sup>

•A municipal Retirement Board member was advised that §§ 23(b)(2) and 23(b)(3) would prohibit him from marketing private investment services to the towns, districts, and county which were members of a public contributory retirement system, where the Board of which he was a member administered that retirement system's funds.<sup>40</sup>

•A member of the Board of Registration in Veterinary Medicine violated §§ 23(b)(2) and 23(b)(3) by making known to the management of a racetrack that employed 12 veterinarians licensed by his Board, and whose licenses could be suspended or revoked by his Board, that he was a Board member, and then requesting free season passes and a free parking sticker from the racetrack.<sup>41</sup>

•A legislator was advised that §§ 23(b)(2) and 23(b)(3) would prohibit him from marketing tax shelter arrangements to persons with a specific interest in a piece of legislation before him.<sup>42</sup>

•A county treasurer violated § 23(b)(3) by soliciting personal loans from a bank at the same time that he was investing county funds or opening county accounts at the bank.<sup>43</sup>

•A State Representative violated §§ 23(b)(2) and 23(b)(3) by attempting to secure grant funding from an agency for a community development corporation at a time when a matter of importance to the agency was pending before a committee of which the Representative was a member.<sup>44</sup>

**II. Public Employees May Have Private Business Relationships Or Other Private Dealings With Those Over Whom They Have Official Authority Or With Whom They Have Official Dealings Only If: (A) The Other Party Initiated the Private Business Relationship Or Other Private Dealing; (B) The Private Business Relationship Or Other Private Dealing is Entirely Voluntary; (C) The Public Employee is Not Receiving any Special or Favorable Treatment of Substantial Value Because of his Position; and (D) The Circumstances Are Fully Disclosed in Writing by the Public Employee.**

A public employee may not initiate a private business relationship or other private dealing with someone over whom he has official authority, or with whom he has official dealings (the "other party").<sup>45</sup> Even when the private business relationship or other

private dealing is initiated by the other party and not by the public employee, such a private business relationship or other private dealing still raises concerns because of the inherently coercive nature of such relationships or dealings.<sup>46</sup> Consequently, such a private business relationship or other private dealing is permissible only if all of the following are true:

(A) it was initiated by the other party;

(B) it is entirely voluntary on the part of the other party;

(C) the public employee does not receive special or favorable treatment of substantial value because of his position; and

(D) the public employee publicly discloses the circumstances in writing.

**A. The Private Business Relationship Or Other Private Dealing Must Be Initiated by the Other Party.**

A person or entity who is under the official authority of a public employee, or who is having official dealings with a public employee, may initiate a private business relationship or other private dealing with a public employee by approaching the public employee and suggesting the private business relationship or other private dealing. For example, a subordinate employee may initiate a private business relationship with his supervisor. The supervisor, however, may not initiate a private business relationship with his subordinate.

A person or entity who is under the official authority of, or having dealings with, a public employee, may initiate a private business relationship with the public employee by giving a public indication of willingness to enter into business relationships of that nature, for example, by publicly advertising the availability of his or his company's services, or by publicly advertising an available position to be filled. Where there has been such an advertisement, the private business relationship will be considered to have been initiated by the other party, and the public employee may approach the other party using the contact information provided in the advertisement, in the same way that any other customer of the company, or applicant for employment, would do. The public employee must not make the approach in the context of the official relationship, such as, at the public workplace, before, during or after a meeting, or

through use of a public office telephone or email account.

*Example:* A selectman owns a house that he would like to rent to the new town administrator, who is seeking rental housing. Because the town administrator is under the selectman's official authority, the selectman may not suggest to him that he rent the house. However, if the selectman advertises the house for rent and the town administrator responds to that advertisement, the transaction will be deemed to have been initiated by the town administrator, and will be permissible so long as it is entirely voluntary, does not involve special or preferential terms, and the selectman makes a written disclosure.

*Example:* The Superintendent of Schools wants to hire someone to build a deck on his home. One of the high school carpentry instructors owns a private construction company that builds decks and advertises its services. The Superintendent may contact the company using the advertised contact information and seek its services. If the company agrees to do the work, the Superintendent may enter into this private business relationship, as long as the relationship is entirely voluntary, the Superintendent does not receive any special or favorable treatment, such as expedited scheduling or a reduced price, and the Superintendent makes a written disclosure.

#### **Pre-existing private business relationships**

From time to time, a public employee may obtain or be promoted to a position in which he has official authority over someone with whom he has a pre-existing private business relationship. In that situation, because the official relationship did not exist when the private business relationship commenced, there was no requirement that the private business relationship have been initiated by the other party or disclosed at its commencement. However, the requirements that the private business relationship be entirely voluntary and that the public employee not receive special or favorable treatment of substantial value because of his position continue to apply, and the public employee must disclose the private business relationship in writing before supervising or taking any official action involving the other party.

*Example:* A firefighter was promoted to Lieutenant in the Fire Department. On his own time, he operates a house painting business in which he employs some of the other firefighters, paying them the same rate as his non-firefighter employees. Because the company's firefighter employees were not under the

Lieutenant's official authority when the private business relationships began, there was no requirement that those relationships have been initiated by them or disclosed at that time. However, the private business relationships now could create an appearance that the Lieutenant could be unduly influenced in his official dealings with them, for example, with respect to detail assignments. Therefore, the Lieutenant must make a public written disclosure of the facts concerning those private business relationships to his appointing authority, the Fire Chief, and he cannot treat the firefighters who privately work for him differently from the firefighters who do not privately work for him. In addition, going forward, he cannot initiate a private business relationship with firefighters under his official authority who do not already work for him privately. He may hire them only if they approach him seeking private employment, he offers them the same terms and conditions of employment as his other private employees, and he makes a public written disclosure of the facts.

#### **B. The Private Business Relationship Or Other Private Dealing Must Be Entirely Voluntary.**

A private business relationship or other private dealing between a public employee and someone under his official authority or with whom he has official dealings must be entirely voluntary on the part of the other party. To determine whether a transaction is voluntary, the Commission will consider whether there is any evidence that the other party would not have entered into the private business relationship or other private dealing voluntarily, such as a statement by the other party that he or she would not have entered into the relationship or dealing absent the official relationship, or special terms and conditions that favor the public employee, and that the other party has not given to anyone else.

*Example:* A Superintendent of Schools arranged for a school department plumber to do work at his house. The Superintendent unilaterally determined the price that he would pay for the work and paid that amount, which was lower than the amount that the plumber would have charged someone else. The plumber stated that he felt uncomfortable discussing price with his boss. This was not a voluntary transaction, and the Superintendent violated § 23(b)(2).<sup>47</sup>

#### **C. The Public Employee Cannot Accept any Special or Favorable Treatment of Substantial Value Even if the Other Party is Willing to Give Such Treatment.**

Public employees cannot accept anything of substantial value that is given to them because of their official position.<sup>48</sup> This means that, even if a person under a public employee's official authority, or having official dealings with a public employee, is willing to give special or favorable treatment to the public employee in the context of a private business relationship, the public employee may not accept such treatment. Examples of preferential treatment that may have substantial value include preference in scheduling and price discounts.

*Example:* A vendor who wishes to secure the goodwill of a public employee who makes purchasing decisions for her agency offers to sell the municipal employee a new computer for half the advertised price, a savings in excess of \$50. Even though the vendor is voluntarily initiating this transaction, it is impermissible because the public employee is being offered a discount of substantial value because of her official position.

**D. A Public Employee Must Publicly Disclose in Writing Any Private Business Relationship Or Other Private Dealing With Those Under His Official Authority, or With Whom He Has Official Dealings.**

G.L. c. 268A, § 23(b)(3) provides that, in circumstances in which there could be an appearance of favoritism or bias in their official actions, public employees may eliminate that appearance of a conflict by making a written disclosure to their appointing authorities, or, if they do not have an appointing authority (for instance, because they are elected), in a manner which is public in nature.<sup>49</sup> In the context of private business relationships and other private dealings between public employees and those under their official authority, or with whom they have official dealings, the Commission has read § 23(b)(3) in conjunction with the prohibition of § 23(b)(2)(ii) and required "something more than the usual disclosure."<sup>50</sup> In particular, the Commission has stated that a public employee's private business relationship or other private dealing with a person or entity under his official authority or with whom he has official dealings will violate § 23(b)(3) unless the public employee makes a public written disclosure which states facts clearly showing that the private business relationship or other private dealing was entirely voluntary and was initiated by the other party.

Such a written disclosure must be made before the public employee acts in an official capacity as to the other party in any circumstances in which the private

business relationship or other private dealing will create an appearance of improper influence or favoritism. The safest course for a public employee considering entering into a private business relationship or other private dealing with a person or entity under his official authority, or with whom he has official dealings, will be to make such a written disclosure when the parties enter into that private business relationship or private dealing, because the need to act officially may arise on short notice.

Disclosure forms and instructions are available on the Commission's website. An appointing authority who receives such a disclosure from a public employee he has appointed may direct the public employee to act or refrain from taking an official action based on information received in such a disclosure.

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This Advisory is not a substitute for advice specific to a particular situation, nor does it mention every aspect of the law that may apply in a particular situation. Public employees can obtain free, confidential advice about the conflict of interest law from the Commission's Legal Division by submitting an electronic request on our website, [www.mass.gov/ethics](http://www.mass.gov/ethics), by calling the Commission at (617) 371-9500 and asking to speak to the Attorney of the Day, or by submitting a written request for advice to the Commission at One Ashburton Place, Room 619, Boston, MA 02108, Attn: Legal Division.

**Approved:** July 16, 2014

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<sup>1</sup> G.L. c. 268A, § 23(b)(2)(i); 930 CMR 5.05 (defining "substantial value" as \$50 or more).

<sup>2</sup> G.L. c. 268A, § 23(b)(2)(ii).

<sup>3</sup> G.L. c. 268A, § 23(b)(3).

<sup>4</sup> *EC-COI-12-1, 95-9, 93-23, 93-6, 92-35, 92-28, 92-18, 92-12, 92-7, 90-9, 84-61.*

<sup>5</sup> *EC-COI-12-1, 95-9, 92-35, 92-7;* G.L. c. 268A, § 23(b)(2)(i).

<sup>6</sup> This list of categories of official authority is illustrative, not exhaustive.

<sup>7</sup> *EC-COI-95-9, 92-7, 84-61.*

- <sup>8</sup> *In Re Piatelli*, 2010 SEC 2296, 2301-02.
- <sup>9</sup> *In Re Wormser*, 2010 SEC 2304, 2309-11.
- <sup>10</sup> *In Re Foresteire*, 2009 SEC 2220.
- <sup>11</sup> *In Re Galewski*, 2007 SEC 2101.
- <sup>12</sup> *In Re Corson*, 1998 SEC 912, 913.
- <sup>13</sup> *EC-COI-92-7*.
- <sup>14</sup> *In Re Garvey*, 1990 SEC 478.
- <sup>15</sup> *In Re Lannon*, 1984 SEC 208.
- <sup>16</sup> *EC-COI-95-9, 92-7, 90-9, 82-124*.
- <sup>17</sup> *In Re Rowan*, 2010 SEC 2293.
- <sup>18</sup> *In Re Keverian*, 1990 SEC 460, 462.
- <sup>19</sup> *EC-COI-90-9*.
- <sup>20</sup> *EC-COI-82-124*.
- <sup>21</sup> *In Re White*, 1982 SEC 80 (involved predecessor sections to §§ 23(b)(2) and 23(b)(3)).
- <sup>22</sup> *In Re Daly*, 2008 SEC 2143. This case involved official dealings (the Executive Director handled the application personally) as well as official authority.
- <sup>23</sup> *EC-COI-92-35*.
- <sup>24</sup> *EC-COI-82-64*.
- <sup>25</sup> *In Re Laumann*, 2010 SEC 2287.
- <sup>26</sup> *EC-COI-82-64*.
- <sup>27</sup> *In Re Hamilton*, 2006 SEC 2043. This case involved official dealings (the board member was participating in the permitting decision) as well as official authority.
- <sup>28</sup> *In Re Parisella*, 1995 SEC 745.
- <sup>29</sup> *In Re Zeppieri*, 1990 SEC 448.
- <sup>30</sup> *In Re Galewski*, 2007 SEC 2101.
- <sup>31</sup> *In Re Hartford*, 1991 SEC 512.
- <sup>32</sup> *In Re Singleton*, 1990 SEC 476, 477.
- <sup>33</sup> *In Re Bagni*, 1981 SEC 30 (involved predecessor sections to §§ 23(b)(2) and 23(b)(3)).
- <sup>34</sup> *EC-COI-12-1, 93-23, 84-61*.
- <sup>35</sup> *In Re Tocco*, 2011 SEC 2377.
- <sup>36</sup> *In Re Bretschneider*, 2007 SEC 2082.
- <sup>37</sup> *In Re Travis*, 2001 SEC 1014.
- <sup>38</sup> *In Re Corson*, 1998 SEC 912.
- <sup>39</sup> *EC-COI-93-6*.
- <sup>40</sup> *EC-COI-92-18*.
- <sup>41</sup> *In Re Trodella*, 1990 SEC 472.
- <sup>42</sup> *EC-COI-84-61*.
- <sup>43</sup> *In Re Antonelli*, 1982 SEC 101, 110.
- <sup>44</sup> *In Re Craven*, 1980 SEC 17, aff'd 390 Mass. 191, 202 (1983).
- <sup>45</sup> *EC-COI-93-23, 93-6, 92-35, 92-28, 92-18, 92-12, 92-07*.
- <sup>46</sup> *EC-COI-92-7*.
- <sup>47</sup> *In Re Foresteire*, 2009 SEC 2220, 2224.
- <sup>48</sup> G.L. c. 268A, § 23(b)(2)(i). This provision was added to c. 268A in 2009 as part of Chapter 28 of the Acts of 2009.
- <sup>49</sup> Members of the General Court file such disclosures with the House or Senate clerk or the State Ethics Commission; elected state or county employees file them with the State Ethics Commission; elected municipal employees file them with the municipal clerk; elected regional school committee members file them with the clerk or secretary of the committee.
- <sup>50</sup> *EC-COI-92-7*



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## **Summaries of Enforcement Actions Calendar Year 2014**

### **In the Matter of Alesandro Basile**

The Commission approved a Disposition Agreement in which former Suffolk County Sheriff's Office Captain Alesandro Basile admitted to violating the conflict of interest law by meeting with his tenants to demand a rent increase, while in uniform, and while accompanied by a uniformed correctional officer, who was visibly armed with a gun, pepper spray and baton. Basile paid a \$1,000 civil penalty. Basile owns an apartment building in East Boston. In early fall 2010, he rented one of the apartments to a married couple who spoke Spanish and limited English. On November 2, 2010, while working as the shift commander at the Suffolk County Jail in Boston, Basile asked a correctional officer who spoke Spanish if he would drive Basile to the apartment building during a shift break and serve as a translator while Basile spoke with his tenants. Basile and the correctional officer, who were both in full SCSO uniform, took a marked SCSO cruiser to the apartment building. The correctional officer was visibly armed with a gun, pepper spray and baton. During a 30-minute conversation with his tenants, Basile, with the correctional officer translating, demanded that the couple pay an additional \$100 per month in rent because another family member was staying with them in the apartment. The couple agreed to pay the additional rent. The next day, Basile asked the same correctional officer to call the couple and tell them there would not be a rent increase. By arriving at his apartment building in a marked SCSO cruiser, and demanding a rent increase from his tenants while in SCSO uniform, and while accompanied by a uniformed, visibly armed correctional officer, Basile violated section 23(b)(2)(ii) of the conflict of interest law by using his SCSO position to intimidate his tenants into agreeing to an increase in their rent. The demand for additional rent was an unwarranted privilege, given the inherently exploitive nature of the circumstances in which it was made.

### **In the Matter of James McCormick**

The Commission approved a Final Order and a Disposition Agreement concluding the adjudicatory proceeding involving former North Middlesex Regional School District Superintendent James McCormick. McCormick admitted to violating the conflict of interest law and agreed to pay a \$2,000 civil penalty. From 1993 through June 2006, McCormick served on the board of directors of the

Merrimack Special Education Collaborative, a municipal agency that provides services and programs to persons with special needs who reside within the Collaborative's member municipalities. On June 5, 2006, McCormick, in his capacity as a Collaborative board member, voted to approve a settlement agreement between the Collaborative and the Merrimack Education Center, a private, non-profit organization on whose board of directors McCormick also served. The Center provides administrative and transportation services to the Collaborative as a vendor, and allows the Collaborative to utilize certain Center property under a license agreement. The settlement agreement authorized the Collaborative to pay \$5.5 million to the Center. At the time he voted to approve the settlement agreement, McCormick was negotiating, or had an arrangement concerning, prospective employment with the Center. McCormick became a Center employee less than a month later on July 1, 2006. McCormick violated section 19 by voting to approve the payment of \$5.5 million by the Collaborative to the Center while he was a member of the Center's board of directors and while he was also negotiating or had an arrangement with the Center for prospective employment.

### **In the Matter of Blake Lamothe**

The Commission approved a Disposition Agreement in which Palmer Redevelopment Authority Chairman Blake Lamothe admitted to violating the conflict of interest law by participating as a PRA member in efforts to secure millions of dollars in state funding to revitalize Union Station, a train depot he owns. Lamothe paid a \$5,000 civil penalty. Lamothe has owned Union Station since 1987. Union Station, the only train station in Palmer, has not had passenger rail service in more than 40 years. In 1999 and again in 2002, the Ethics Commission's Enforcement Division sent confidential letters to Lamothe advising him that his ownership of Union Station and his efforts as a PRA member to rehabilitate the station and restore passenger rail service raised concerns under the conflict law because Lamothe had a financial interest in those matters. Lamothe in 2002 filed a written disclosure with the PRA and the town clerk acknowledging that he was "directly interested in the rehabilitation and development of Union Station and in restoring passenger rail service," and that he would recuse himself from any PRA matter affecting the property. In 2004, Lamothe and his

wife opened the Steaming Tender Restaurant inside Union Station. In August 2012, Lamothe voted as PRA chairman to hire Larry Shaffer Associates Municipal Solutions, LLC to apply for a MassWorks infrastructure grant through the state Executive Office of Housing and Economic Development to support the restoration of passenger rail service at Union Station. In September 2012, Lamothe voted on and signed a resolution authorizing Shaffer Associates to submit a grant application on behalf of the PRA, seeking approximately \$3.5 million for improvements to Union Station and the immediate surrounding area, including parking, train platforms and restrooms. The application for funding was denied. Lamothe had a financial interest in the MassWorks grant application, because it would provide funding for improvements to his property and its surrounding area, which would increase the value of Union Station. By inviting Shaffer Associates to submit a proposal to complete the MassWorks application, voting to hire, and signing a contract with, Shaffer Associates, and authorizing the company to submit the grant application, Lamothe violated section 19 of the conflict of interest law.

#### **In the Matter of Robert Wilson**

The Commission approved a Disposition Agreement in which Leicester Emergency Medical Services Department Executive Director Robert Wilson admitted to violating the conflict of interest law in connection with submitting false records claiming that several Emergency Medical Technicians had completed 24 hours of recertification training in 2008. Wilson admitted to submitting records that claimed 12 EMTs had attended the minimum of 24 hours of classroom instruction when they had not. Wilson paid a civil penalty of \$2,000. Massachusetts law requires EMTs to renew their certification every two years. The recertification course must include a minimum of 24 hours of classroom instruction. Leicester EMS received state approval for a training program over three days in September 2008, from 8 a.m. to 5 p.m. each day, to be led by a program coordinator and instructor. Wilson, as EMS executive director, was ultimately responsible for ensuring that all EMTs had received the proper training. In October 2008, the State Department of Health and Human Services' Office of Emergency Medical Services received information suggesting that the EMTs who participated in the course did not complete 24 hours of classroom instruction. The OEMS investigated and determined that the second day of instruction was held for no more than four hours and the third day did not take place at all. The OEMS issued letters of reprimand to all 12 EMTs involved and ordered them to re-take the certification

refresher training. Additionally, the OEMS cited Leicester EMS for failing to meet standards for recertification of its staff. By falsely attesting that he completed the required hours of instruction, and allowing his EMT subordinates to do the same, Wilson violated section 23(b)(2).

#### **In the Matter of Karen Durant**

The Commission approved a Disposition Agreement in which Leicester Emergency Medical Services Emergency Medical Technician Karen Durant admitted to violating the conflict of interest law by providing false records claiming that several EMTs had completed 24 hours of recertification training in 2008. Durant admitted to submitting records that claimed 12 EMTs, including herself and EMS Director Robert Wilson, had attended the minimum of 24 hours of classroom instruction when they had not. Durant paid a civil penalty of \$2,000. Massachusetts law requires EMTs to renew their certification every two years. The recertification course must include a minimum of 24 hours of classroom instruction. Leicester EMS received state approval for a training program over three days in September 2008, from 8 a.m. to 5 p.m. each day, to be led by Durant as program coordinator and instructor. In October 2008, the State Department of Health and Human Services' Office of Emergency Medical Services received information suggesting that the EMTs who participated in the course did not complete 24 hours of classroom instruction. The OEMS investigated and determined that the second day of instruction was held for no more than four hours and the third day did not take place at all. Durant told OEMS that she believed all the required material had been covered during the shortened classroom sessions, though she signed off on all the attendance sheets that indicated the EMTs had attended the full 24 hours. Durant sent two emails to the course attendees regarding the OEMS investigation, in which she asked them to falsely corroborate that her course included 24 hours of classroom instruction. Following its investigation, OEMS revoked Durant's EMT certification for three months beginning May 2, 2009. The town of Leicester suspended Durant during the same time period, part of which she went without pay. The OEMS also issued letters of reprimand to all 12 EMTs involved and ordered them to re-take the certification refresher training. Additionally, the OEMS cited Leicester EMS for failing to meet standards for recertification of its staff. By falsely certifying that the EMTs attending the September 2008 recertification course completed the mandatory requirement of a minimum of 24 hours of classroom instruction, Durant violated section 23(b)(2).

### **In the Matter of John Barranco**

The Commission approved a Joint Motion to Dismiss the adjudicatory proceeding involving former Merrimack Special Education Collaborative Executive Director John Barranco. The adjudicatory proceeding was initiated in August 2011 by the Commission's Enforcement Division filing an Order to Show Cause alleging that Barranco violated the conflict of interest law by, as Executive Director for the Merrimack Special Education Collaborative, a municipal agency, or as Executive Director of the private Merrimack Education Center exercising control over the Collaborative's activities, arranging for Richard McDonough, a lobbyist for the Center, to have a position at the Collaborative in which McDonough did almost no work, but which enabled him to receive public pension benefits to which he was not entitled. In dismissing the case against Barranco, the Commission cited the existence of an ongoing related federal investigation by the U.S. Attorney's Office. The Commission noted that the allegations underlying the federal investigation were first made public in 2011 and, therefore, concluded, "[w]hile the Commission may stay rather than dismiss a pending adjudicatory proceeding at the request of another agency, the Commission believes that it should dismiss rather than stay these proceedings because, given the length of time that already has passed, further delays at the request of another agency are not consistent with the interests of justice."

### **In the Matter of Richard W. McDonough**

The Commission approved a Joint Motion to Dismiss the adjudicatory proceeding involving Merrimack Special Education Collaborative employee Richard W. McDonough. The adjudicatory proceeding was initiated in August 2011 by the Commission's Enforcement Division filing an Order to Show Cause alleging that McDonough violated the conflict of interest law by misusing his official position with the Collaborative to receive public pension benefits to which he was not entitled. In dismissing the case against McDonough, the Commission cited the existence of an ongoing related federal investigation by the U.S. Attorney's Office. The Commission also noted that McDonough is in federal prison after being convicted on unrelated charges and that he is not scheduled to be released until January, 2018. The Commission noted that the allegations underlying the federal investigation were first made public in 2011 and, therefore, concluded, "[w]hile the Commission may stay rather than dismiss a pending adjudicatory proceeding at the request of another agency, the Commission believes that it should dismiss rather than stay these proceedings because, given the length

of time that already has passed, further delays at the request of another agency are not consistent with the interests of justice."

### **In the Matter of Demetrius Atsalis**

The Commission approved a Final Order and Disposition Agreement concluding the adjudicatory proceeding involving former State Representative Demetrius Atsalis. Atsalis admitted to violating the financial disclosure law by failing to timely file his 2012 Statement of Financial Interests and paid a \$100 civil penalty. On March 6, 2014, the Commission's Enforcement Division issued an Order to Show Cause alleging that Atsalis violated the financial disclosure law by filing his 2012 SFI 62 days late, and, therefore, owed a \$700 civil penalty. Atsalis' 2012 SFI was required to be filed by May 28, 2013. The Commission sent Atsalis a Formal Notice of Lateness by first class mail on June 5, 2013, notifying him that he had 10 days to file, or he would be subject to a civil penalty. Atsalis did not file until August 19, 2013, 62 days after the end of the 10-day grace period. Atsalis failed to pay the \$700 civil penalty. After the OTSC was issued, Atsalis contacted the Commission and stated that he did not timely receive the Notice. The Commission sent the Notice to the post office box provided by Atsalis on both his 2010 and 2011 SFIs as his mailing address. Apparently, in electronically filing his 2010 SFI, Atsalis transposed two numbers of his post office box, providing an incorrect mailing address. The error was carried over to the next year's SFI and was not noticed or corrected by Atsalis. Atsalis informed the Commission that the Notice was eventually forwarded to the correct post office box. Although the exact date of receipt could not be established, Atsalis contacted the Commission on August 8, 2013, and acknowledged that he had received the Notice, and he filed his SFI 11 days later. Since August 8, 2013 was the earliest date on which receipt could be established, the 10-day grace period began on that date. Atsalis filed one day after the end of the grace period. Based on the Commission's fine schedule for late submission of an SFI, the civil penalty for filing one day late is \$100. Atsalis was required to file a 2012 SFI because he held the office of state representative for more than 30 days in 2012.

### **In the Matter of Richard Prue**

The State Ethics Commission approved a Disposition Agreement in which Richard Prue, the transportation director of the Greater Lawrence Educational Collaborative, admitted to repeatedly violating the conflict of interest law by approving payments to a transportation vendor which employed his wife as a bus monitor. Prue paid a \$5,000 civil penalty. From

2008 to 2009, Prue, a Lawrence resident, received, reviewed and approved invoices from transportation vendors who worked with GLEC, a public nonprofit that provided special education programs and transportation for students with special needs. During this period, Prue's wife worked as a bus monitor for one of the vendors, First Choice Transit, Inc. Prue, as the GLEC transportation director, reviewed and approved First Choice Transit's invoices, which he knew included charges for the work performed by his wife. From 2008 to 2009, Prue's wife earned approximately \$5,000 as a bus monitor on GLEC bus routes. By, as the GLEC transportation director, reviewing and approving First Choice Transit's invoices, Prue participated in a particular matter in which he knew his wife had a financial interest, and therefore he repeatedly violated section the conflict of interest law.

#### **In the Matter of Michael Potaski**

The Commission approved a Disposition Agreement in which Uxbridge Conservation Commission member Michael Potaski admitted to violating the conflict of interest law by appearing on several occasions before the ConCom and by sending an email to the state Department of Environmental Protection on behalf of Uxbridge Housing Associates, which owns the 66 unit Crown and Eagle housing development. Potaski paid a \$2,500 civil penalty for the violations. Potaski is the unpaid UHA vice president. At the November 5<sup>th</sup>, November 19<sup>th</sup> and December 3, 2012 ConCom meetings, Potaski abstained as a ConCom member and then spoke on behalf of UHA to oppose an application for a notice of intent filed by the Mumford River Condominium Trust, which was seeking a permit to dam and divert a watercourse that flowed underneath its building. The Crown and Eagle housing development is located downstream from the Mumford building. Potaski also sent an email on November 29, 2013 to the DEP in an effort to have DEP intervene in the matter. Potaski violated section 17(c) by representing UHA at ConCom meetings and by sending the email to the DEP, all in opposition to the Mumford notice of intent.

#### **In the Matter of Darryl Clark**

The Commission issued a Decision and Order in which it found that the Commission's Enforcement Division failed to prove allegations that Massachusetts Bay Transportation Authority Painters Foreman Darryl Clark violated sections 23(b)(2)(i) and 23(b)(2)(ii) of the conflict of interest law by soliciting loans from two temporary MBTA painters who were his subordinates. The adjudicatory proceeding was initiated by the Enforcement

Division's filing of an Order to Show Cause on December 12, 2012, alleging that in 2010, Clark separately approached the two painters, Thomas Steiner and Alexandre Gomes, asking for loans of \$500 and \$300 respectively. Steiner and Gomes worked as MBTA temporary painters who reported to Clark and were Clark's subordinates. They were not friends with Clark in 2010, and did not associate with him outside of work. Steiner and Gomes left the MBTA in December 2011 when their contracts expired. Testimony from Clark, Steiner and Gomes offered "starkly different versions of the alleged solicitations." Steiner and Gomes testified that their work environment became hostile after they refused to give money to Clark, while Clark argued that the allegations were fabricated by both men in an attempt to get the MBTA to hire them as permanent employees. The Decision stated that there was no other testimony or evidence in the record about the reporting and/or any investigation by the MBTA regarding Clark's alleged solicitation of Steiner and Gomes. The Commission stated, "In this case, where the evidence presents two competing versions of what occurred, with no independent corroborating evidence, [the Enforcement Division] failed to meet its burden of proving each element of the alleged violations by a preponderance of the evidence."

#### **In the Matter of Kevin Franck**

The Commission issued a Final Order to allow a motion to suspend proceedings, accept the Respondent's payment of the civil penalty and dismiss the proceedings, concluding the adjudicatory hearing involving Kevin Franck, the former Director of Communications for the Executive Office of Labor and Workforce Development. Franck paid a \$300 civil penalty for failing to timely file his calendar year 2012 Statement of Financial Interests. On September 17, 2014, the Commission's Enforcement Division issued an Order to Show Cause alleging that Franck violated the financial disclosure law by failing to file his 2012 SFI on time. Franck filed his SFI 28 days late. According to the Commission's civil penalty schedule for late filers, Franck owed a \$300 civil penalty. The Commission dismissed the proceedings involving Franck after receipt of his payment of \$300.

#### **In the Matter of Bruce Duarte**

The Commission issued a Decision and Order finding that Bruce Duarte, a senior property manager at the New Bedford Housing Authority, violated section 19 of the conflict of interest law by directing NBHA staff to stop the eviction of his brother from an NBHA apartment. The Commission ordered Duarte to pay a civil penalty of \$1,000. Duarte, as a senior

property manager, had the authority and discretion to stop evictions of tenants in NBHA housing and to direct his subordinates to stop evictions. Duarte's brother, John Duarte, was an NBHA resident in 2009 and 2010. During John's tenancy he allegedly exhibited behavior that created problems with NBHA staff and other tenants and also failed to pay his rent on time. Duarte initially told NBHA staff that he did not want to be involved with his brother, and that John should be treated like any other resident. However, Duarte did become involved in John's NBHA tenancy on a number of occasions. In 2010, the NBHA began the process to evict John for non-payment of rent in the Bristol Housing Court in New Bedford. On August 23, 2010, the NBHA obtained a default judgment from the Housing Court in the eviction action, and in early September 2010, obtained an Execution on Judgment against John authorizing the Sheriff's Department to clear the apartment and return the premises to the NBHA. Duarte knew of John's failure to pay rent and of the Housing Court proceedings against John. On the morning of September 13, 2010, an NBHA management aide spoke with Duarte and told him that John was being evicted. Duarte then decided to direct the aide to stop the eviction. Duarte, on his own official authority, made the decision to stop his brother's eviction. John did not have access to other free housing at the time, and had his brother not stopped the eviction, John would have had to find and pay for new housing or have been homeless. Although John remained in NBHA housing into December of 2010, he did not comply with an agreement for judgment to pay his unpaid rent and other fees to the NBHA. John was evicted and moved out in December 2010, owing the NBHA back rent and fees. The Commission found that "the preponderance of the evidence establishes that Duarte personally and substantially participated in his official capacity as a NBHA senior property manager in the decision to stop his brother's eviction (a decision in which his brother had to his knowledge a financial interest) by, in the exercise of his official authority, personally making the decision and directing his subordinate to stop the eviction."

#### **In the Matter of Elizabeth Gorski**

The Commission issued a Decision and Order following a public hearing regarding allegations that Elizabeth Gorski, a Selectman in Groveland, violated the conflict of interest law by taking certain actions after the chief of police placed her son, a Groveland Police officer, on administrative leave. The Commission found that Gorski committed a single violation of section 23(b)(2)(ii) of the conflict of interest law by threatening negative employment

action against the chief and deputy chief of police, but that the Commission's Enforcement Division failed to prove any of its other claims against Gorski. In a separate order, the Commission also addressed a motion to dismiss the proceeding filed by Gorski on the ground that the Enforcement Division improperly failed to produce documents during the discovery process. In its Order on the Motion to Dismiss, the Commission agreed with Gorski that the Enforcement Division made an "egregious" error by failing to produce those documents or identify their existence to the hearing officer. The Commission noted that such failure "is particularly troublesome if the information withheld is exculpatory or unfavorable to Petitioner's case, as it is in this case." However, because the allegations to which those documents related were ultimately not proven, the Commission decided that Gorski's motion to dismiss was moot as to those claims; the Commission denied the motion as to the remaining claims. The Commission addressed the Enforcement Division's argument regarding its failure to disclose the documents, stating, "we reject the argument that Petitioner's actions were justified by confidentiality requirements and ... emphasize that Petitioner was required both by our rules and by due process to raise issues about the confidentiality of documents with the Presiding Officer." With respect to its finding that Gorski committed a single violation of section 23(b)(2)(ii), the Commission found that Gorski improperly used her position as a Selectman in an attempt to secure her son's return to active duty when she spoke with Deputy Chief Jeffrey Gillen during a chance meeting in a Georgetown restaurant on January 26, 2012. During that conversation, Gorski discussed her son's leave and noted that the Deputy Chief and Chief's employment contracts were coming up for renewal. Although Gorski previously had abstained in her position as Selectman from acting on police matters, during this encounter, she threatened to take negative action with regard to their contracts. The Commission found that Gorski violated section 23(b)(2)(ii) by attempting to use her position as a Selectman to threaten the Deputy Chief and Chief's contract renewals in connection with her expressed desire to see her son reinstated as a police officer. The Commission assessed a civil penalty of \$2,500 for this violation. The Commission found that the Enforcement Division failed to prove that Gorski had committed any other violation of the conflict of interest law.

#### **In the Matter of Stephen Hyde, Sr.**

The State Ethics Commission issued a Decision and Order finding that former Southampton Fire Department Chief Stephen Hyde, Sr. violated

sections 23(b)(2)(ii) and 23(b)(4) of the conflict of interest law by altering duty records to credit his son, an SFD call firefighter, for work his son did not perform, and by submitting those false records to the Town of Southampton for payment to his son in 2011. The Commission ordered Hyde to pay a \$7,500 civil penalty. The Commission found that the Enforcement Division failed to prove an allegation that Hyde violated the conflict of interest law by installing an SFD-owned generator at his home. Hyde's son was an SFD firefighter and emergency medical technician in 2011. As the Chief, Hyde was the only full-time employee of the SFD. The other employees, including Hyde's son, were hourly employees who responded to fire and ambulance calls or provided station coverage duty. Firefighters would fill out a "call sheet" in order to be paid for the hours they worked. The call sheets were then placed in a locked box to which only Hyde had access, and Hyde would submit them to the Town every two weeks for payment. The Commission found that in 2011, Hyde used his position as chief to check off or add his son's name on as many as 47 call sheets for days and times when his son had not responded to ambulance or fire calls, or performed station coverage duties. Hyde presented false payroll records to the Town for his son to be paid at least \$200 for ambulance and fire calls to which his son did not respond, and approximately \$6,172 for 336 hours of daytime station coverage that his son did not perform. Hyde testified that the payments he caused to be made by the Town to his son were for repair and maintenance work that his son performed on SFD vehicles and equipment, primarily at Hyde's garage at his home. His son testified to having performed roughly 193 hours of repair and maintenance work, although neither he nor Hyde documented any of the work that Hyde's son performed for the SFD. In 2011, based on the altered payroll records, Hyde's son received at least 16 payments of substantial value, which is \$50 or more. The Commission stated, "We find that Hyde's alteration of the call sheets is more consistent with an intent on his part to create a false record to support his payment of his son for call and daytime station coverage that his son did not perform than it is with an intent to keep track of repair and maintenance work purportedly performed by his son at some earlier, unspecified time." The Commission found that Hyde violated section 23(b)(4) by presenting 16 false or fraudulent claims for payments of substantial value to his son for work his son had not performed.

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COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION

SUFFOLK, ss.

COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0001

IN THE MATTER OF  
ALESANDRO BASILE

**DISPOSITION AGREEMENT**

The State Ethics Commission (“Commission”) and Alesandro Basile (“Basile”) 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 February 15, 2013, 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 Basile. On November 21, 2013, the Commission concluded its inquiry and found reasonable cause to believe that Basile violated G.L. c. 268A, § 23(b)(2)(ii).

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

**Findings of Fact**

1. Basile, who resides in Rowley, began work at the Suffolk County Sheriff’s Office (“SCSO”) in May 1986. Basile was promoted to the rank of captain in January 2010.
2. The SCSO runs the Suffolk County Jail (the “Jail”) in Boston. As a captain, Basile was an SCSO shift commander at the Jail. Correctional officers report to the shift commander on duty.
3. Basile owns an apartment building in East Boston (the “Building”). In early fall 2010, Basile rented one of the apartments in the building to a husband and wife who spoke Spanish and limited English.
4. On November 2, 2010, Basile was working as the shift commander at the Jail in Boston. Basile asked a correctional officer who spoke Spanish if he would drive Basile during the dinner break to the

Building and serve as an interpreter for Basile with his tenants. The correctional officer agreed to Basile’s request to drive him to the Building and serve as his interpreter.

5. Basile and the correctional officer left the SCSO facility during the dinner break and drove to the Building in an SCSO cruiser. Basile was in full SCSO uniform. The correctional officer was also in full uniform. In addition, he was carrying a gun, pepper spray and baton, all of which were visible.

6. When they arrived at the Building, Basile rang the doorbell and the tenants told Basile and the correctional officer to come in. During the conversation between Basile and the tenants, which lasted about 30 minutes, for which the correctional officer served as interpreter, Basile asked the couple to pay an additional \$100 monthly rent for another family member that was staying at the apartment. The couple agreed to pay the additional rent. Basile and the correctional officer then left the Building and returned to the Jail.

7. About a day later, Basile gave the correctional officer the tenants’ telephone number and asked him (the correctional officer) to call the tenants and tell them that there would not be a rent increase. The correctional officer complied with Basile’s request.

8. Basile retired from the SCSO on November 14, 2012.

**Conclusions of Law**

9. 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 his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

10. By asking the correctional officer to accompany him to the Building in a marked SCSO cruiser, while both men were in SCSO uniform and the correctional officer was visibly armed with a gun, pepper spray and baton, Basile used his SCSO position in connection with a request for additional rent.

11. Under the inherently exploitive nature of the circumstances, the request for additional rent was an unwarranted privilege. *See In re Bretschneider*, 2007 SEC 2082 (sheriff violated G.L. c. 268A, § 23(b)(2) by arriving in a sheriff department cruiser in uniform and discussing purchase of property with a person on whom he was serving eviction papers as sheriff).

12. The additional monthly rent of \$100 was of substantial value.

13. The privilege of a rent increase obtained through such intimidation was not properly available to similarly situated individuals (i.e., other landlords seeking a rent increase).

14. Therefore, by, in the manner described above, using his official position as SCSO captain to solicit additional monthly rent of \$100 from his tenants, Basile knowingly used his official position to obtain for himself an unwarranted privilege of substantial value not properly available to other similarly situated individuals, thereby violating § 23(b)(2)(ii).

### Resolution

In view of the foregoing violation of G.L. c. 268A by Basile, 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 Basile:

(1) that Basile pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2)(ii); and

(2) that Basile 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: January 30, 2014

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 12-0005**

**IN THE MATTER OF  
JAMES McCORMICK**

**FINAL ORDER**

On January 30, 2014, the parties submitted a Joint Motion to Suspend Proceedings, Accept Proposed

Disposition Agreement and Dismiss the Proceedings in the above-captioned matter.

The Order to Show Cause (“OTSC”) in this case alleges that from 1993 through June, 2006, Respondent James McCormick (“McCormick”) served on the Board of Directors of the Merrimack Special Education Collaborative (“Collaborative”), a municipal agency, and consequently was a municipal employee within the meaning of the conflict of interest law, G.L. c. 268A.

The OTSC further alleges that the Merrimack Education Center (“Center”), a private non-profit corporation, provides administrative and transportation services to the Collaborative and a license to use real estate. McCormick allegedly served as a member of the Center’s Board of Directors from 1993 through June, 2006.

On June 5, 2006, as a director of the Collaborative, McCormick allegedly voted to approve a Settlement Agreement between the Collaborative and the Center requiring the Collaborative to pay \$5.5 million to the Center. Petitioner alleges that McCormick violated G.L. c. 268A, § 19 and § 23(b)(3) because, as an employee of the Collaborative, he did not disclose to his appointing authority that he also was a director of the Center, or that, at the time, he was negotiating or had an arrangement regarding prospective employment with the Center. McCormick became an employee of the Center beginning July 1, 2006.

In the proposed Disposition Agreement, Respondent McCormick agrees that he violated G.L. c. 268A, § 19 and further agrees to pay a civil penalty of \$2,000 to the State Ethics Commission.

On February 20, 2014, the Commission voted to allow the Joint Motion and to approve the Disposition Agreement.

Accordingly, the Disposition Agreement regarding James McCormick is **APPROVED** and the Joint Motion to Suspend Proceedings, Accept Proposed Disposition Agreement and Dismiss the Proceedings is **ALLOWED**. Commission Adjudicatory Docket No. 12-0005, *In the Matter of James McCormick*, is hereby **DISMISSED**.<sup>1</sup>

**DATE AUTHORIZED:** February 20, 2014

**DATE ISSUED:** March 4, 2014

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<sup>1</sup> Commissioner Paula Finley Mangum was not present and is not a signatory to this Order.

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 12-0005**

**IN THE MATTER OF  
JAMES MCCORMICK**

**DISPOSITION AGREEMENT**

The State Ethics Commission (“Commission”) and James McCormick (“McCormick”) 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 May 18, 2012, the Commission (a) found reasonable cause to believe that James McCormick (“McCormick”) violated G.L. c. 268A, §§ 19 and 23(b)(3); and (b) authorized the initiation of adjudicatory proceedings. On June 4, 2012, the Enforcement Division filed an Order to Show Cause initiating public adjudicatory proceedings.

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

**Findings of Fact**

1. The Merrimack Special Education Collaborative (the “Collaborative”) is a public agency established in 1976, pursuant to G.L. c. 40, § 4E, to provide its member municipalities with, among other services, educational, vocational, and therapeutic programs for persons with special needs.

2. The Merrimack Education Center, Inc. (the “Center”) is a private, non-profit corporation that provides various educational programs and services, including administrative and transportation services to the Collaborative and a license to the Collaborative to use certain real property owned by the Center. The Collaborative pays the Center for these programs, services and property rentals. Much of the Center’s income has been derived from providing these programs and services for a fee.

3. McCormick, a resident of Leominster, served on the Collaborative’s Board of Directors from in or about 1993 through June 2006.

4. McCormick served on the Center’s Board of Directors from in or about 1993 through June 2006.

5. On June 5, 2006, the Collaborative’s Board of Directors, with McCormick participating, voted 5-0 to approve a Settlement Agreement between the Collaborative and the Center under which the Collaborative agreed to pay \$5.5 million to the Center. The Settlement Agreement called for an immediate payment to the Center by the Collaborative of \$4 million, followed by six additional annual payments of \$250,000 each.

6. At the time McCormick voted to approve the payment of \$5.5 million from the Collaborative to the Center, he was negotiating with or had an arrangement concerning prospective employment with the Center.

7. McCormick became an employee of the Center beginning July 1, 2006.

8. On October 18, 2012, as a result of claims that included the June 5, 2006 \$5.5 million payment from the Collaborative to the Center, the Collaborative and the Center entered into a settlement agreement under which, among other things, the Center paid the Collaborative \$4.1 million.

**Conclusions of Law**

9. As a member of the Collaborative’s Board of Directors, McCormick was a municipal employee within the meaning of G.L. c. 268A.

10. In relevant part, § 19(a) prohibits a municipal employee from participating as such in a particular matter in which, to his knowledge, he or a business organization in which he is serving as a director, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

11. The Collaborative board’s June 5, 2006 vote to approve the payment of \$5.5 million by the Collaborative to the Center was a particular matter.

12. McCormick participated in that particular matter by voting as a Collaborative board member to approve the payment of \$5.5 million by the Collaborative to the Center.

13. The Center was a business organization because much of its income was derived from providing programs and services for a fee.

IN THE MATTER OF  
BLAKE LAMOTHE

DISPOSITION AGREEMENT

14. At the time he voted as a Collaborative board member to approve the payment to the Center, McCormick was serving as a member of the Center’s Board of Directors and was negotiating with or had an arrangement concerning prospective employment with the Center.

15. The Center had a financial interest in the vote because it was to be the recipient of the \$5.5 million.

16. When he participated in this vote, McCormick was aware of the Center’s financial interest in that decision.

17. Therefore, by voting as a Collaborative board member to approve the payment of \$5.5 million to the Center while he was also a member of the Center’s Board of Directors and while he was negotiating with or had an arrangement concerning prospective employment with the Center and knew that the Center had a financial interest in the vote, McCormick violated § 19.

In view of the foregoing violation of G.L. c. 268A by McCormick, 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 McCormick:

- (1) that McCormick pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$2,000<sup>1</sup> as a civil penalty for violating G.L. c. 268A, § 19; and
- (2) that McCormick 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: March 4, 2014

<sup>1</sup> At the time of McCormick’s violation of § 19, the maximum civil penalty was \$2,000 per violation.

COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION

SUFFOLK, ss.

COMMISSION  
ADJUDICATORY

The State Ethics Commission (“Commission”) and Blake Lamothe (“Lamothe”) 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 March 15, 2013, 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 October 17, 2013, the Commission concluded its inquiry and found reasonable cause to believe that Lamothe violated G.L. c. 268A, § 19.

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

**Findings of Fact**

- 1. Since 1998, Lamothe, a resident of the Town of Palmer (“Town”), has been a member of the Palmer Redevelopment Authority (“PRA”). For the past ten years, he has served as PRA chairman. As such, Lamothe is a municipal employee as that term is defined in G.L. c. 268A, § 1.
- 2. In his private capacity, Lamothe is president and the sole shareholder of Real Estate Restoration, Inc.
- 3. Since 1987, Real Estate Restoration, Inc. has owned Union Station, the only train station in the Town. Union Station has not operated as a passenger rail station in over 40 years.
- 4. In 1999, and again in 2002, the Commission’s Enforcement Division sent private education letters to Lamothe advising that his ownership of Union Station and his efforts as a PRA member to rehabilitate the station and restore passenger rail service raised concerns under § 19 of the conflict of interest law, among other sections, because he had a financial interest in those matters.
- 5. By letter dated January 31, 2002, Lamothe filed a disclosure pursuant to G.L. c. 268A, § 23(b)(3)<sup>1</sup> with the PRA and the town clerk, acknowledging that he was “directly interested in the rehabilitation and

development of Union Station and in restoring passenger rail service”, and announcing that he would recuse himself from any PRA matter affecting the Union Station.

6. In 2004, Lamothe and his wife opened the Steaming Tender Restaurant inside Union Station.

7. In or about July 2012, Lamothe, in his capacity as PRA chairman, invited Larry Shaffer Associates Municipal Solutions, LLC (“Shaffer Associates”) to submit a proposal to the PRA whereby Shaffer Associates would, for a fee, complete a MassWorks<sup>2</sup> infrastructure grant application on behalf of the PRA for funding to make improvements to Union Station to support the restoration of passenger rail service at Union Station.

8. In August 2012, Lamothe: (1) voted as a PRA member to hire Shaffer Associates to complete the MassWorks grant application on behalf of the PRA; and (2) signed the contract between the PRA and Shaffer Associates in his capacity as PRA chairman.

9. In September 2012, as a PRA member, Lamothe voted on and signed a resolution authorizing Shaffer Associates to submit the completed MassWorks grant application to the Massachusetts Executive Office of Housing and Economic Development.

10. The MassWorks grant application submitted on behalf of the PRA sought approximately \$3.5 million for improvements to Union Station and the immediate surrounding area, including parking to accommodate 400 vehicles, train platforms with awnings, restrooms, ticketing terminals, benches, lighting and signage.

11. The Executive Office of Housing and Economic Development denied the PRA’s request for funding.

### Conclusions of Law

12. Except as otherwise permitted by § 19<sup>3</sup> of G.L. c. 268A, § 19 prohibits a municipal employee from participating<sup>4</sup> as such an employee in a particular matter<sup>5</sup> in which, to his knowledge, he has a financial interest.<sup>6</sup>

13. The decision to apply for the MassWorks infrastructure grant to fund improvements to Union Station to support the restoration of passenger rail service was a particular matter.

14. Lamothe participated in that particular matter by, in his capacity as PRA chairman, inviting Shaffer

Associates to submit a proposal to complete the MassWorks application on behalf of the PRA, voting to hire Shaffer Associates and signing the contract with Shaffer Associates, and voting on and signing the PRA resolution authorizing Shaffer Associates to submit the completed MassWorks grant application.

15. Lamothe had a financial interest in the particular matter because the grant would provide \$3.5 million to fund improvements to Union Station and the immediate surrounding area, which would increase the value of Union Station, which is owned by the company of which Lamothe is president and sole shareholder.

16. At the time of his participation, Lamothe knew he had a financial interest in the particular matter because his company owned Union Station, which was the only train station in the Town, and the Enforcement Division had repeatedly warned him that he had financial interests in PRA matters related to Union Station.

17. Accordingly, Lamothe violated § 19 by, in his capacity as PRA chairman, participating in the decision to apply for MassWorks infrastructure grant funding to make improvements to Union Station to support the restoration of passenger rail service at Union Station, a decision in which he knew he had a financial interest.

In view of the foregoing violation of G.L. c. 268A by Lamothe, 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 Lamothe:

- (1) that Lamothe 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; and
- (2) that Lamothe 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:** March 5, 2014

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<sup>1</sup> Section 23(b)(3) prohibits a public employee from, knowingly or with reason to know, acting in a

manner which would cause a reasonable person, knowing all of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy that person's 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. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

<sup>2</sup> The MassWorks Infrastructure Program provides public infrastructure funding to support economic development. The MassWorks Infrastructure Program is administered by the Massachusetts Executive Office of Housing and Economic Development.

<sup>3</sup> None of the exemptions applies.

<sup>4</sup> "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).

<sup>5</sup> "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).

<sup>6</sup> "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).

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0005**

**IN THE MATTER OF**

**ROBERT WILSON**

**DISPOSITION AGREEMENT**

The State Ethics Commission ("Commission") and Robert Wilson ("Wilson") 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 March 15, 2013, 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 Wilson. On November 21, 2013, the Commission concluded its inquiry and found reasonable cause to believe that Wilson violated G.L. c. 268A, § 23(b)(2).

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

**Findings of Fact**

1. In the Town of Leicester (the "Town"), ambulance and emergency medical services are provided by the Town's Emergency Medical Services Department ("the EMS Department"). Wilson, a Leicester resident, has been the EMS Department executive director since 2000. As the EMS Department executive director, Wilson is ultimately responsible for ensuring that all the EMS Department emergency medical technician ("EMT") employees are certified as a condition for employment. Wilson also serves as an EMS Department EMT when necessary. Wilson is paid approximately \$15.00 per hour when he is called on to act as an EMT. Wilson has held his EMT-Basic certification since 1978 and understands the recertification requirements.

2. Under state law, EMTs must renew their certification every two years. To obtain recertification, EMTs holding the "Basic" certification must attend an approved refresher training course that includes a minimum of 24 hours of classroom instruction. EMT refresher courses can be held by accredited training institutions or through an individual program approved by the State Department of Health and Human Services' Office of Emergency Medical Services ("OEMS"). If an EMT is not timely recertified, the EMT is prohibited from working as an EMT.

3. On August 6, 2008, the OEMS received an application from the EMS Department for approval to

provide an individual refresher training program for its EMTs. The proposed training was to be held from 8:00 a.m. to 5:00 p.m. over three days: September 13, 2008, September 14, 2008, and September 28, 2008. Upon review of the application, the OEMS approved the training course sponsored by the EMS Department.

4. On October 9, 2008, the OEMS received a report that the EMT refresher course had not included the minimum 24 hours of required instruction, and that the 12 EMTs who took the course, including Wilson, had falsely signed the attendance rosters documenting completion of the full 24 hours of instruction.

5. The OEMS commenced an investigation that included interviews with Wilson as well as with 10 of the 12 EMTs who signed the attendance rosters. The OEMS determined that the September 13, 2008 class only lasted from 8:00 a.m. until 3:00 or 4:00 p.m., and the September 14, 2008 class only went from 8:00 a.m. until sometime between 10:00 a.m. and noon. The third day of classes, September 28, 2008, did not take place at all.

6. Copies of the attendance rosters for the EMT refresher course for each of the three days show that attendees (including Wilson) signed each attendance roster as having attended the training for eight hours on each of the three days. Each attendance roster has an instruction to the EMTs that states: "If the number of hours the program was actually held is less than the number of hours the program was approved for the number of hours for the program will be reduced."

7. The OEMS found that the 12 EMTs had knowingly signed attendance rosters falsely representing that they had completed the required hours of instruction. On February 26, 2009, the OEMS issued letters of reprimand to all 12 EMTs and required them to re-take refresher training. Also on February 26, 2009, the OEMS issued a "Notice of Serious Deficiency" to the EMS Department for its failure "to ensure that all EMT-Basic refresher programs have been conducted in accordance with Department [OEMS] approved standards."<sup>1</sup> The OEMS notified the EMS Department that it had to submit to the OEMS a plan for addressing the deficiencies. On March 30, 2009, the Town submitted such a plan, which the OEMS approved on April 13, 2009.

#### **Conclusions of Law**

8. Section 23(b)(2) of G.L. c. 268A 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 unwarranted privileges which are of substantial value and which are not properly available to similarly situated individuals.<sup>2</sup>

9. Wilson used his EMS Department executive director position to falsely attest that he attended the EMT refresher course and had met the state's mandatory EMT recertification training requirements.

10. EMT recertification is a privilege.

11. Where Wilson attempted to secure his recertification by misrepresenting that he had completed the required hours of instruction, the privilege was unwarranted.

12. The recertification was of substantial value because it was a prerequisite to his continuing to receive compensation of \$50 or more as an EMS Department EMT.

13. The privilege of recertification without having completed the required hours of instruction was not properly available to similarly situated individuals.

14. Therefore, by, in the manner described above, using his official position as EMS Department executive director to falsely attest that he had completed the required hours of instruction, Wilson attempted to use his official position to obtain for himself an unwarranted privilege of substantial value not properly available to other similarly situated individuals, thereby violating § 23(b)(2).

15. Wilson is the EMS executive director and, as such, is ultimately responsible for ensuring that all EMS Department EMTs are certified, as that is a condition of their employment. Wilson's presence and participation at the EMT refresher course, which included his dishonest signing of the attendance rosters, is an exacerbating factor, as his conduct tacitly gave his subordinate EMT employees authorization to do the same.

#### **Resolution**

In view of the foregoing violation of G.L. c. 268A by Wilson, 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 Wilson:

(1) that Wilson pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$2,000<sup>3</sup> as a civil penalty for violating G.L. c. 268A, § 23(b)(2);

(2) that Wilson 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:** March 13, 2014

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<sup>1</sup> Failure to submit an acceptable and timely plan of correction or failure to correct in accordance with the plan are grounds for enforcement action including suspension or revocation of a license, certification, certificate of inspection, designation or other form of approval. 105 CMR 170.710

<sup>2</sup> G.L. c. 268A was amended by c. 28 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(ii) of G.L. c. 268A, as amended.

<sup>3</sup> In imposing a civil penalty, however, the Commission notes that the conduct took place before September 29, 2009, the effective date of the increase in the civil penalties for violations of G.L. 268A. At the time of Wilson's violation of § 23(b)(2), the maximum civil penalty was \$2,000 per violation.

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0004**

**IN THE MATTER OF  
KAREN DURANT**

**DISPOSITION AGREEMENT**

The State Ethics Commission ("Commission") and Karen Durant ("Durant") 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 March 15, 2013, 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 Durant. On November 21, 2013, the Commission concluded its inquiry and found reasonable cause to believe that Durant violated G.L. c. 268A, § 23(b)(2).

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

**Findings of Fact**

1. In the Town of Leicester, ambulance and emergency medical services are provided by the town's Emergency Medical Services Department ("the Leicester EMS Department"). Durant, a Leicester resident, has been employed full-time by the Leicester EMS Department as an emergency medical technician ("EMT") since 2000. Leicester EMS Department EMTs are required to be certified.

2. Under state law, EMTs must renew their certification every two years. To obtain recertification, EMTs holding the "Basic" certification must attend an approved refresher training course that includes a minimum of 24 hours of classroom instruction. EMS refresher courses can be held by accredited training institutions or through an individual program approved by the State Department of Health and Human Services' Office of Emergency Medical Services ("OEMS").

3. On August 6, 2008, OEMS received an application from the Leicester EMS Department for approval to provide an individual refresher training program for its EMTs. The application listed Durant, a Leicester EMS Department EMT, as the program coordinator and lead instructor. The proposed training was to be held from 8:00 a.m. to 5:00 p.m. over three days: September 13, 2008, September 14, 2008, and September 28, 2008. Upon review of the application, OEMS approved the training course sponsored by the Leicester EMS Department.

4. On October 9, 2008, OEMS received a report that the Leicester EMT refresher course had not included the minimum 24 hours of instruction required, and that the 12 EMTs who took the course, including Durant<sup>1</sup>, had fraudulently signed rosters documenting completion of the full 24 hours of instruction.

5. OEMS commenced an investigation that included interviews with Durant as well as 10 of the 12 EMTs who signed the training rosters. OEMS

determined that the class on September 13, 2008, only lasted from 8:00 a.m. until 3:00 or 4:00 p.m., and the class on September 14, 2008, only went from 8:00 a.m. until sometime between 10:00 a.m. and noon. The third day of classes, September 28, 2008, did not take place at all. At the end of the second day of classes, Durant told the attendees that there would not be a need for a third day of classes.

6. Durant told OEMS investigators that she made the decision to conduct the refresher course in this shortened time and believed that all the required material had been covered.

7. Copies of the attendance rosters for the Leicester EMT refresher course for each of the three days show that attendees (including Durant) signed each roster as having attended the training for eight hours on each of the three days. Each roster has an instruction to the EMTs that states: "If the number of hours the program was actually held is less than the number of hours the program was approved for the number of hours for the program will be reduced." Each roster also has a signature line where Durant attested that the roster was a true record of attendance. Durant testified that she knew that the time sheets that were being signed were fraudulent.

8. In October 2008, Durant sent out two emails to course attendees regarding the OEMS investigation asking the attendees to falsely corroborate that the Leicester EMT refresher course involved 24 hours of classroom instruction.

9. On February 11, 2009, OEMS notified Durant that it was revoking her EMT certification for a period of three months for her role in the Leicester EMT training matter. Durant did not request a hearing, and her EMT certificate was revoked from May 2, 2009 until July 31, 2009; during this same 90 day period, the Town of Leicester suspended Durant.

10. OEMS also found that the 12 EMTs had knowingly signed attendance rosters falsely representing that they had completed the required hours of instruction. On February 26, 2009, OEMS issued letters of reprimand to all 12 EMTs and required them to re-take refresher training. Also on February 26, 2009, OEMS issued a "Notice of Serious Deficiency" to the Leicester EMS Department for its failure "to ensure that all EMT-Basic refresher programs have been conducted in accordance with Department approved standards."<sup>2</sup> OEMS notified the Leicester EMS Department that it had to submit to OEMS a plan for addressing the deficiencies. On March 30, 2009, the town submitted

such a plan, which OEMS approved on April 13, 2009.

### **Conclusions of Law**

11. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from, knowingly, or with reason to know, using or attempting to use her official position to secure for herself or others unwarranted privileges which are of substantial value and which are not properly available to similarly situated individuals.<sup>3</sup>

12. Durant used her Leicester EMS Department EMT instructor position to falsely certify that the attendees of the Leicester EMT refresher course, including herself, had met the state's mandatory EMT recertification training requirements.

13. An EMT recertification is a privilege.

14. Where Durant attempted to recertify herself and the other attendees without meeting the state requirements, the privilege was unwarranted.

15. The recertification was of substantial value because it allowed the EMTs to continue to be gainfully employed.

16. The privilege of recertification without having the required hours of instruction was not properly available to similarly situated individuals.

17. Therefore, by, in the manner described above, using her official position as an EMS Department EMT to falsely certify that the attendees of the September 2008 Leicester EMT refresher course had met the state's mandatory EMT recertification training requirements, Durant knowingly used her official position to obtain for herself and others unwarranted privileges of substantial value not properly available to other similarly situated individuals, thereby violating § 23(b)(2).

18. Durant's violation is significantly aggravated by her attempts to have the attendees falsely corroborate that the Leicester EMT refresher course involved 24 hours of classroom instruction. In imposing a civil penalty, however, the Commission notes that the incident took place before the civil penalties for violations of G.L. 268A were increased effective September 29, 2009. At the time of Durant's violation of § 23(b)(2), the maximum civil penalty was \$2,000 per violation.

### **Resolution**

In view of the foregoing violations of G.L. c. 268A by Durant, 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 Durant:

(1) that Durant pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2);

(2) that Durant 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:** March 13, 2014

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<sup>1</sup> As an instructor of the 24 hour refresher course, Durant was also entitled to have her own EMT status recertified.

<sup>2</sup> Failure to submit an acceptable and timely plan of correction or failure to correct in accordance with the plan are grounds for enforcement action including suspension or revocation of a license, certification, certificate of inspection, designation or other form of approval. 105 CMR 170.710

<sup>3</sup> G.L. c. 268A was amended by c. 28 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(ii) of G.L. c. 268A, as amended.

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 11-0018**

**IN THE MATTER OF  
JOHN BARRANCO**

**FINAL ORDER**

On March 17, 2014, the parties filed a Joint Motion to Dismiss the Proceedings.

On August 17, 2011, Petitioner filed an Order to Show Cause alleging that either as Executive

Director of the Merrimack Special Education Collaborative (“Collaborative”), a municipal agency, or as the Executive Director of the Merrimack Education Center (“Center”) exercising control over the Collaborative’s activities, Respondent John Barranco (“Barranco”) violated G.L. c. 268A, § 23(b)(2) and § 23(b)(3) by arranging for Richard W. McDonough to have a position at the Collaborative in which he did virtually no work and enabling McDonough to receive pension benefits to which he was not entitled.

Petitioner also alleges that by hiring McDonough and renewing his contracts as Public Affairs Director for the Collaborative rather than continuing to retain him as an outside lobbyist for the Center, Barranco shifted the cost of McDonough’s compensation from the Center to the Collaborative. The Center allegedly was a business organization, and Barranco allegedly was a Center employee. Petitioner alleges that Barranco violated § 19 by participating as a Collaborative employee in a particular matter in which the Center had a financial interest.

In the Joint Motion to Dismiss, the parties report that in December, 2013, a federal grand jury returned an indictment of Carl A. Nystrom, former Chief Financial Officer of the Center. The indictment refers to Lobbyist A, the Director of Public Affairs and Government, which was McDonough’s title at the Center.

Attached to the Motion is a letter from Assistant United States Attorney Andrew E. Lelling stating that the federal investigation encompassed Nystrom’s colleagues and associates at the Center and the Collaborative and persons who appear to have been impermissibly enrolled in the Massachusetts State Retirement System. Lelling expressed concerns that there may be substantial factual and evidentiary overlap between the Ethics Commission matter and the federal matter, and that developments in the Ethics Commission matter could adversely affect the federal prosecution of Nystrom or the ongoing federal investigation. Lelling respectfully suggests that the Commission move to stay its case pending resolution of the federal matter.

In the Motion, Petitioner states that the United States Attorney’s Office is in the best position to address the matter, and that dismissal of this Commission’s proceedings is in the best interest of the parties, the State Ethics Commission and the public. The Motion notes that substantial resources would be required to proceed with this matter, with a high probability of

out-of-state travel and/or reimbursement of travel expenses for out-of-state witnesses.

Barranco argues that the passage of time has affected his ability to defend this matter, as illustrated by the death of two Collaborative board members and the incapacity of a third since the Order to Show Cause was filed.

The Commission notes that the allegations underlying the federal investigation were first made public in 2011. While the Commission may stay rather than dismiss a pending adjudicatory proceeding at the request of another agency, the Commission believes that it should dismiss rather than stay these proceedings because, given the length of time that already has passed, further delays at the request of another agency are not consistent with the interests of justice.

Accordingly, the Joint Motion to Dismiss is **ALLOWED**, and the above-captioned matter is **DISMISSED**.

**DATE AUTHORIZED:** April 17, 2014

**DATE ISSUED:** April 22, 2014

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 11-0017**

**IN THE MATTER OF  
RICHARD W. McDONOUGH**

**FINAL ORDER**

On March 17, 2014, the parties filed a Joint Motion to Dismiss the Proceedings.

On August 17, 2011, Petitioner filed an Order to Show Cause alleging that Respondent Richard W. McDonough violated G.L. c. 268A, § 23(b)(2). The OTSC alleges that, as Director of Public Affairs and Governmental Relations of the Merrimack Special Education Collaborative, McDonough misused his official position to receive pension benefits to which he was not entitled.

In the Joint Motion to Dismiss, the parties report that in December, 2013, a federal grand jury returned an indictment of Carl A. Nystrom, former Chief

Financial Officer of the Center. The indictment refers to Lobbyist A, the Director of Public Affairs and Government, which was McDonough's title at the Center.

Attached to the Motion is a letter from Assistant United States Attorney Andrew E. Lelling stating that the federal investigation encompassed Nystrom's colleagues and associates at the Center and the Collaborative and persons who appear to have been impermissibly enrolled in the Massachusetts State Retirement System. Lelling expressed concerns that there may be substantial factual and evidentiary overlap between the Ethics Commission matter and the federal matter, and that developments in the Ethics Commission matter could adversely affect the federal prosecution of Nystrom or the ongoing federal investigation. Lelling respectfully suggests that the Commission move to stay its case pending resolution of the federal matter.

In the Motion, Petitioner states that the United States Attorney's Office is in the best position to address the matter, and that dismissal of this Commission's proceedings is in the best interest of the parties, the State Ethics Commission and the public. The Motion notes that substantial resources would be required to proceed with this matter, with a high probability of out-of-state travel and/or reimbursement of travel expenses for out-of-state witnesses.

The Commission notes that the allegations underlying the federal investigation were first made public in 2011. While the Commission may stay rather than dismiss a pending adjudicatory proceeding at the request of another agency, the Commission believes that it should dismiss rather than stay these proceedings because, given the length of time that already has passed, further delays at the request of another agency are not consistent with the interests of justice.

In addition, on September 9, 2011, Respondent McDonough was sentenced to seven years in federal prison after being convicted on charges unrelated to this matter. His release date is in January, 2018. The Commission concludes that McDonough's continued incarceration would complicate the progress of an adjudicatory hearing and could restrict his ability to engage meaningfully in his defense.

For these reasons, the Joint Motion to Dismiss is **ALLOWED**, and the above-captioned matter is **DISMISSED**.

**DATE AUTHORIZED:** April 17, 2014

DATE ISSUED: April 22, 2014

DATE AUTHORIZED: May 22, 2014

DATE ISSUED: May 29, 2014

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COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION

SUFFOLK, ss.

COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0003

IN THE MATTER OF  
DEMETRIUS ATSALIS

FINAL ORDER

On April 29, 2014, the parties filed a Joint Motion to Suspend Proceedings, Accept Proposed Disposition Agreement and Dismiss the Proceedings (“Joint Motion”) along with a proposed Disposition Agreement, requesting that the Commission approve the Disposition Agreement in settlement of this matter and dismiss this adjudicatory proceeding. The Presiding Officer, Barbara A. Dortch-Okara, referred the Joint Motion, with the Disposition Agreement, to the full Commission for deliberations on May 22, 2014.

In the proposed Disposition Agreement, Respondent Demetrius Atsalis admits that he violated G.L. c. 268B, § 5, and agrees to pay a civil penalty of \$100. Respondent further agrees 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. Respondent has tendered the payment of the \$100 civil penalty.

In support of the Joint Motion, the parties assert that the proposed Disposition Agreement is consistent with the Commission’s schedule of penalties imposing fines for Statements of Financial Interests filed one to ten days after receipt of a Formal Notice of Lateness. The parties further assert that the interests of justice, the parties and the Commission will be served by the Disposition Agreement.

**WHEREFORE**, the Commission hereby **ALLOWS** the Joint Motion. The Disposition Agreement is **APPROVED**. Respondent’s tendered payment of the \$100 civil penalty for violating G.L. c. 268B, § 5 is accepted. Commission Adjudicatory Docket No. 14-0003, *In the Matter of Demetrius Atsalis*, is **DISMISSED**.

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COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION

SUFFOLK, ss.

COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0003

IN THE MATTER OF  
DEMETRIUS ATSALIS

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Demetrius Atsalis (“Atsalis”) 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 November 21, 2013, 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. 268B by Atsalis. On January 16, 2014, the Commission concluded its inquiry and found reasonable cause to believe that Atsalis violated G.L. c. 268B, § 5.

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

1. Atsalis, a resident of West Hyannisport, served as an elected State Representative for more than 30 days in 2012.
2. Having served as an elected public official for more than 30 days in 2012, Atsalis was required to file a Statement of Financial Interests (“SFI”) for calendar year 2012 in accordance with G.L. c. 268B.
3. Atsalis’ SFI for 2012 was required to be filed by May 28, 2013, in accordance with G.L. c. 268B.
4. Atsalis did not file an SFI on or before May 28, 2013. On June 5, 2013, the Commission sent by first class mail a Formal Notice of Lateness (“Notice”) to Atsalis. The Notice advised Atsalis that his SFI had not been filed and was, therefore, delinquent. The Notice further advised Atsalis that failure to file his 2012 SFI within 10 days of receipt of the Notice would result in the imposition of civil penalties. The

Commission allows three days for receipt of the Notice if sent by first class mail. Therefore, Atsalis would not have incurred a civil penalty if he had filed his SFI by June 18, 2013.

5. General Laws c. 268B, § 4 authorizes the Commission to impose a civil penalty of up to \$10,000 for each violation of c. 268B. The Commission has adopted the following civil penalty schedule for SFIs filed more than 10 days after the receipt of the Notice.

1-10 days late	\$100
11-20 days late	\$200
21-30 days late	\$300
31-40 days late	\$400
41-50 days late	\$500
51-60 days late	\$600
61-70 days late	\$700
71-80 days late	\$800
81-90 days late	\$900
91-100 days late	\$1,000
101- 110 days late	\$1,100
111-120 days late	\$1,200
121 days to the day before an Order to Show Cause is issued	\$1,250
The date an Order to Show Cause is issued to the day before a Decision and Order is issued by the Commission	\$2,500
The date a Decision and Order is issued by the Commission	Up to \$10,000

6. On August 8, 2013, Atsalis contacted the Commission and acknowledged that he had received the Notice. Atsalis filed his 2012 SFI with the Commission on August 19, 2013, eleven days later.

7. In March 2014, after the Order to Show Cause was filed, Atsalis contacted the Enforcement Division to discuss this matter. According to Atsalis, he did not timely receive the Notice sent by the Commission. The Commission possesses documentation showing that the Commission sent the Notice to the post office box provided by Atsalis on both his 2010 and 2011 SFIs as his home address. Apparently, in electronically filling out his 2010 SFI, Atsalis transposed two numbers of his post office box address, and, as a result, provided the incorrect address. This error was carried over to his electronic filing of his 2011 SFI, and was not noticed or corrected by Atsalis.

8. Although the exact date Atsalis received the Notice cannot be established, Atsalis stated that the Notice had been forwarded to his correct post office box and he acknowledged receiving the Notice on August 8, 2013. The Notice advised Atsalis that failure to file his 2012 SFI within 10 days of receipt of the Notice would result in the imposition of civil penalties. Therefore, based on the date Atsalis acknowledged receiving the Notice, August 8, 2013, he would not have incurred a civil penalty if he had filed his SFI by August 18, 2013. Atsalis filed his 2012 SFI with the Commission on August 19, 2013. Atsalis failed to timely file his SFI after receiving the Notice, and, therefore, violated G.L. c. 268B, § 5. Atsalis' SFI was one day late, and based on the Commission's fine schedule for late submission of an SFI, the civil penalty is \$100.

**Resolution**

In view of the foregoing violation of G.L. c. 268B by Atsalis, 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 Atsalis:

- (1) that Atsalis pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$100 as a civil penalty for violating G.L. c. 268B, § 5; and
- (2) that Atsalis 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:** May 29, 2014

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0008**

**IN THE MATTER OF  
RICHARD PRUE**

**DISPOSITION AGREEMENT**

The State Ethics Commission (“Commission”) and Richard Prue (“Prue”) 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 April 19, 2013, 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. The Commission concluded its inquiry and voted to find reasonable cause to believe that Prue violated G.L. c. 268A on February 20, 2014, as amended by its vote on May 22, 2014.

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

#### **Findings of Fact**

1. During the relevant time, Prue, a resident of Lawrence, was the transportation director of the Greater Lawrence Educational Collaborative (“GLEC”). As such, Prue was a “municipal employee” as that term is defined in G.L. c. 268A, § 1.
2. From 2008 through 2009, GLEC was a public nonprofit entity that provided special education programs and transportation for special needs students.
3. Prue, as GLEC transportation director, received, reviewed and approved invoices from GLEC transportation vendors in 2008 and 2009.
4. First Choice Transit, Inc. (“First Choice Transit”) was a GLEC vendor.
5. Prue’s wife worked as a bus monitor for First Choice Transit in 2008 and 2009.
6. As a First Choice Transit employee, Prue’s wife was a bus monitor on GLEC bus routes and received a salary for that work.
7. First Choice Transit issued monthly invoices to GLEC for transportation services on GLEC routes, including the work performed by Prue’s wife as a bus monitor.
8. Prue, as GLEC transportation director, reviewed and approved First Choice Transit’s invoices, which he knew included charges for the work performed by

his wife as a bus monitor, even though she was not identified by name in the invoices.

9. From 2008 through June 2009, Prue’s wife earned approximately \$5,000 as a bus monitor on GLEC bus routes.

#### **Conclusions of Law**

##### **Section 19**

10. Except as otherwise permitted,<sup>1</sup> § 19 of G.L. c. 268A prohibits a municipal employee from participating<sup>2</sup> as such an employee in a particular matter<sup>3</sup> in which, to his knowledge, he or an immediate family member<sup>4</sup> has a financial interest.<sup>5</sup>

11. First Choice Transit’s invoices, as claims for payment, were particular matters.

12. Prue participated in those particular matters as the GLEC transportation director by reviewing and approving First Choice Transit’s invoices.

13. Prue’s wife is a member of his immediate family.

14. Prue’s wife had a financial interest in the claims for payment since the invoices included charges for her work as a bus monitor on GLEC routes.

15. At the times he participated as described above, Prue knew his wife had a financial interest in those particular matters.

16. Therefore, Prue violated § 19 each time he reviewed and approved payments to First Choice Transit for work his wife had performed as an employee of that company.

In view of the foregoing violations of G.L. c. 268A by Prue, 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 Prue:

(1) that Prue 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 repeatedly violating G.L. c. 268A, § 19; and

(2) that Prue 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 31, 2014

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<sup>1</sup> None of the exemptions in § 19 applies.

<sup>2</sup> “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).

<sup>3</sup> “Particular matter” is defined, in part, as “any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision [or] determination . . . .” G.L. c. 268A, § 1(k).

<sup>4</sup> “Immediate family” means the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, § 1(e).

<sup>5</sup> “Financial interest” means any economic interest of a particular individual that is not shared with a substantial segment of the public. *Graham v. McGrail*, 370 Mass. 133 (1976).

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 14-0009**

**IN THE MATTER OF  
MICHAEL POTASKI**

**DISPOSITION AGREEMENT**

The State Ethics Commission (“Commission”) and Michael Potaski (“Potaski”) 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 April 19, 2013, the Commission initiated a preliminary inquiry, pursuant to c. 268B, § 4(a), into possible violations of the conflict of interest law, G.L. c. 268A, by Potaski. On March 20, 2014, the Commission concluded its inquiry and found reasonable cause to believe that Potaski violated G.L. c. 268A, § 17(c).

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

**Findings of Fact**

1. From 2008 to the present, Potaski, a resident of Uxbridge, has served as a member of the Uxbridge Conservation Commission (“ConCom”).

2. Since 2011, and in his private capacity, Potaski served as the unpaid vice president of Uxbridge Housing Associates, Inc. (“UHA”), a private non-profit organization that provides housing for low-income seniors and disabled individuals.

3. The ConCom is responsible for issuing Orders of Conditions (“permits”) to remove, fill, dredge or alter property near wetlands.

4. UHA owns the Crown and Eagle, an Uxbridge housing development with approximately 66 units.

5. On October 22, 2012, Mumford River Condominium Trust (“Mumford”) filed a Notice of Intent (“NOI”) with the ConCom for a permit to dam and divert the watercourse underneath its building.

6. Uxbridge Housing Associates, as owner of Crown and Eagle, which is located downstream from Mumford’s building, opposed the permit because it was UHA’s understanding that the permit violated Crown and Eagle’s water rights and because of health concerns related to water stagnation.

7. Potaski recused himself from participating as a ConCom member in the public hearings involving the Mumford NOI.

8. However, Potaski as UHA vice president, represented UHA in opposition to the permit at the Mumford NOI hearings on November 5 and 19 and December 3, 2012.

9. On November 29, 2012, on behalf of UHA as its vice president, Potaski emailed the Massachusetts Department of Environmental Protection (“DEP”) regarding the Mumford NOI in hopes that the DEP

would intervene to prevent the ConCom from issuing a permit.

10. Potaski's actions on behalf of UHA were not in the proper discharge of his ConCom duties.

### Conclusions of Law

11. Section 17(c) of G.L. c. 268A prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent for anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

12. As a ConCom member, Potaski was a "municipal employee," as that term is defined in G.L. c. 268A, § 1.

13. The Mumford NOI was a particular matter because it was an application.<sup>1</sup>

14. The Town of Uxbridge was a party to and had a direct and substantial interest in that particular matter because the ConCom was the permit granting authority.

15. Potaski acted as agent for UHA by representing UHA at the Mumford NOI hearings and emailing the DEP on UHA's behalf concerning the Mumford NOI.

16. By acting on UHA's behalf in connection with the Mumford NOI as described above, Potaski acted as agent for someone other than the town in connection with a particular matter in which the town was a party and/or had a direct and substantial interest. By doing so, Potaski violated § 17(c).

In view of the foregoing violations of G.L. c. 268A by Potaski, 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 Potaski:

(1) that Potaski 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, § 17(c); and

(2) that Potaski 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:** August 1, 2014

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<sup>1</sup> "Particular matter" is defined, in part, as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision [or] determination . . . ." G.L. c. 268A, § 1(k).

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION  
ADJUDICATORY  
DOCKET NO. 12-0017**

**IN THE MATTER OF  
DARRYL CLARK**

Appearances: Candies Pruitt-Doncaster, Esq.  
Counsel for Petitioner

Patrick M. Troy, Esq.  
Counsel for Respondent

Commissioners: Barbara Dortch-Okara, Ch.,  
William J. Trach and Regina L. Quinlan<sup>1</sup>

Presiding Officer: Commissioner Regina L. Quinlan

**DECISION AND ORDER**

**I. Introduction & Allegations**

This matter concerns allegations that Respondent Darryl Clark, a Massachusetts Bay Transportation Authority ("MBTA") Painters Foreman, solicited loans from two temporary MBTA painters who were his subordinates: a \$500 loan from Thomas Steiner, and a \$300 loan from Alexandre Gomes, in violation of the conflict of interest law, G.L. c. 268A, §§ 23(b)(2)(i)<sup>2</sup> and 23(b)(2)(ii).<sup>3</sup>

**II. Procedural Background**

This matter began on December 12, 2012, with Petitioner's issuance of an Order to Show Cause alleging that Clark violated G.L. c. 268A,

§§ 23(b)(2)(i) & (ii) in 2010. Clark answered on February 7, 2013 denying the alleged violations. On March 11, 2014, the adjudicatory hearing in this matter was held before Commissioner Quinlan. Two documents were marked for identification; no exhibits were admitted into evidence. Petitioner submitted Facts Deemed Admitted (“Admissions”).<sup>4</sup> Petitioner called Steiner and Gomes as witnesses. Clark testified as his sole witness. Both parties made closing arguments before Commissioner Quinlan at the conclusion of the adjudicatory hearing and subsequently filed briefs.

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

### **III. The Undisputed Facts**

In 2010, Clark was a full-time, paid employee of the MBTA working as a Painters Foreman who supervised the painting of MBTA train cars. His job duties included giving assignments to the MBTA temporary painters. Thomas Steiner (“Steiner”) and Alexandre Gomes (“Gomes”) began working at the MBTA in 2007 as temporary employees. They were placed at the MBTA by the union and were full-time employees on a temporary contract. In 2010, Steiner and Gomes were working as MBTA temporary painters who reported to Clark and were Clark’s subordinates. Neither Steiner nor Gomes were friends with Clark in 2010, nor did they associate with him outside of work. Steiner and Gomes left the MBTA in December 2011 when their contracts expired. Clark is still employed by the MBTA.

### **IV. The Evidence**

The pivotal issue on which this matter turns is whether Clark asked either Steiner or Gomes to loan him money. On this issue, the testimony of Steiner and Gomes was directly contradicted by the testimony of Clark.

#### **Clark’s Alleged Solicitation of Steiner**

Steiner testified that on May 20, 2010, while Steiner was in their work area on the platform at the MBTA’s Cabot Car House, Clark approached Steiner and asked to borrow \$500. When Steiner said no, Clark asked Steiner if he could do \$300. Steiner responded to Clark: “[I]t’s not the amount. I just don’t feel comfortable lending you money.” Steiner did not lend Clark money. Steiner also testified that

he did not remember telling a Commission Investigator on March 2, 2011, during his first interview with the Commission relating to these allegations, that Clark allegedly solicited him for money over the telephone. Steiner testified he didn’t remember saying that, but he did remember saying to the Investigator that Clark asked him for money on site. He further testified that he was not sure if the other members of the crew who were all present that day heard his conversation with Clark and that no one approached him and told him that they had heard it.

Steiner initially testified that he made notes about Clark’s asking him for money on the same day that it happened in his truck, where he keeps a note pad and pen to write job estimates for his side work, i.e., private, non-MBTA work. Steiner’s notes included a statement that Clark “didn’t speak to [Steiner] until the next day.” When asked how he could have known that Clark would not speak to him until the next day if he wrote the note on May 20, 2010, Steiner responded that he “didn’t say [he] completed the whole note in one day.” He subsequently testified that he made his notes either the day of or the next day.

Clark denied ever asking Steiner to loan him money. He admitted discussing money only once with Steiner, which occurred while they were at work in the Spring,<sup>5</sup> and which related to one of Steiner’s side jobs. When Steiner said that he had a big potential side job that might be coming through for him, Clark told Steiner he would work for Steiner, and asked Steiner his rate. Steiner replied that he did not think a painter should get more than \$25 an hour. Clark told Steiner that although he normally got more than that, he needed the money, and he would work for Steiner and that \$25 an hour for 8 hours was \$200.<sup>6</sup> Steiner testified, however, that he never discussed side work with Clark and that he does not recall telling Clark that he had a side painting job and discussing the issues and aspects of side painting jobs with Clark. He further testified that he “[n]ever” discussed money with Clark specifically relating to side jobs and side work.

#### **Clark’s Alleged Solicitation of Gomes**

Gomes testified that Clark asked him for money two times.<sup>7</sup> Gomes did not know the date of Clark’s first request, which was for \$80. Gomes did not give Clark the requested \$80. The second time was during the summer of 2010 when Gomes was working. Clark stopped Gomes and asked Gomes for money. When Gomes grabbed his wallet, Clark said he did not “want the change,” he “want[ed] real money.”

When Gomes asked how much he wanted, Clark said \$300. Gomes said “no, “I don’t have \$300.” Gomes testified that when he was interviewed by a Commission Investigator over the telephone, although he told her Clark solicited him twice for money, he did not mention any amount for the first solicitation. He also testified that he made notes about the second time Clark asked him for money and that he had those notes, but did not have them with him at the hearing.

Clark denied ever asking Gomes to loan him money. He admitted only that he and Gomes sometimes shared lunch money.<sup>8</sup> There is no testimony in the record from Gomes about lunch money. When testifying under oath at the Commission on January 19, 2012, Clark denied ever asking Gomes for money<sup>9</sup> and made no mention about lunch money relating to Gomes, although he did testify at that time to requesting and exchanging lunch money with another MBTA employee, Nate Ruffin, whom he described as a longtime friend.<sup>10</sup> Clark explained the inconsistency between his prior testimony at the Commission and his hearing testimony by stating that he answered questions in January 2012 based on the allegations which did not involve Ruffin or lunch money.

### **The Aftermath of the Alleged Solicitations**

#### ***The Alleged Hostile Work Environment & Schedule Changes***

Both Steiner and Gomes testified that the good working relationship they had with Clark changed after he asked them for money. Steiner testified that the relationship became “hostile” and “retaliatory.” According to Steiner, he was locked out of the break room in the middle of the summer where they kept the water, and was given the brunt of the work to do. Gomes testified that Clark was “more into [him], . . . asking for more things or see [sic] [him] with [a] microscope so everything [Gomes] d[id] is not good, is not doing right.” According to Gomes, it was “like when somebody’s in your skin. . . . Like vague things.”

In addition, Steiner and Gomes further testified that their schedules changed after Clark asked them for money. Steiner testified that the very next day, his schedule was changed abruptly with no notice from the second shift, which was the night shift, to the first shift. Gomes testified that his schedule was changed from the first shift to the second shift.<sup>11</sup> Although Gomes testified he usually preferred the night shift, the summer of 2010 was different because he had his

children with him which made it hard to work nights. He asked Clark not to change his shift. Although both Steiner and Gomes testified that they did not get any notice about the schedule change, their testimonies differed as to what notice, if any, was required. Steiner testified that his shift had never been changed without notice and that he normally got two weeks’ notice.<sup>12</sup> Gomes, however, testified that it was not his experience as a temporary MBTA employee that he got notice two weeks before a shift change and that he had not received notice before any other schedule change.

According to Clark, everyone got their shift changed at some point, including him. He testified that there were a lot of shift changes in 2010. According to Clark, sometimes shifts were changed at the request of, and for the benefit of, temporary employees, including Steiner and Gomes, because they did not have sick or vacation time. Clark testified that they would ask to work a double shift so they would not have to lose hours when going to a doctor’s appointment or for some other personal reason such as a side job for Steiner. Clark further testified that shift or location changes for temporary employees would also be made based on a specific need for workers at a location to perform a job. According to Clark, although employees who reported to him made schedule change requests to him, Clark would run it by the MBTA Supervisor (“Supervisor”) because he did not have the power to say yes or no. He would just put the request in. Clark testified that work schedules and hours were controlled by the Supervisor, who would give him “leeway on it” as long as Clark kept him informed of who was switching or changing shifts. According to Clark, if the request did not throw Clark off schedule, the Supervisor would not deny it.

#### ***Reporting of the Alleged Solicitations***

Both Steiner and Gomes testified that they reported to others that Clark had asked them for money. Steiner testified that about two weeks after Clark’s request, in early June 2010, he reported it to Joe Guarino (“Guarino”), the union business representative for the MBTA painters.<sup>13</sup> Steiner testified that after getting no satisfaction from the union, which told him there was nothing the union could do, he reported it in early December 2010 to Paul Miner (“Miner”), who was the Supervisor for the MBTA at the Cabot Car House. Steiner also wrote up what happened and submitted it to “Mr. Butler” in the MBTA’s Office of Diversity (“Diversity Office”).<sup>14</sup>

Gomes testified that he reported Clark's request for money to Miner a few months after it happened. He waited a few months "because I thought everything was going to settle and then when I notice I was grand chance [sic] to loose [sic] my work, my job because the rumors start around." Gomes further testified that before his contract was ending, everyone was calling him and telling him things, including that Clark was telling everyone that Gomes was gone and was not going to renew. When Gomes realized he was in jeopardy, he "ha[d] to do something to protect [his] job" because he "ha[d] to feed [his] family." Gomes testified that he did not know if Miner was the right person to report it to, but that he did what he thought was right and reported it to somebody above him, and that his doing so was not a "vendetta."<sup>15</sup> He just wanted "to protect [his] job." Gomes also testified that he reported it to a lawyer for the MBTA's Diversity Office.<sup>16</sup>

#### ***The 2011 Non-Extension of Steiner's and Gomes' Contracts***

Steiner testified that after he made his report to Miner, threats such as, "I'll get back at you" and "you can be replaced" were made. He further testified that Clark said he "can't be fired." Gomes testified to hearing rumors that Clark was telling everyone Gomes was gone and he was not going to renew. In contrast, Clark testified that he did not have any power to renew or not renew temporary employees' contracts at the MBTA.

Clark testified that in 2009, after the business agent told Steiner and Gomes that their contracts were coming up and were not going to get extended, Steiner and Gomes both came to Clark and asked him if there was anything he could do for them. When Clark said he did not know of anything that he could do, he was asked if he could talk to somebody. Clark then went to see Steve Atkins ("Atkins"), the MBTA Green Line Director, to ask if there was any way possible Atkins could extend Steiner and Gomes because they had already been through the training and knew the job. Clark testified that Atkins asked Clark what he would have to do. Clark told Atkins he'd probably have to call someone at the union hall and go from there. After Clark gave him the union hall number, Atkins called, talked to Guarino, and Steiner's and Gomes' contracts were extended for 104 weeks.

Clark further testified that he did not try to help Steiner and Gomes get their contracts renewed after the summer of 2010. He testified: "[T]he business agent came out and let them know there's not going

to be any extension because of the allegations and stuff that was going on plus what it was people was [sic] trying to force the T to hire them permanent once they was [sic] on two years with no break in service ... ." According to Clark, because people were trying to use that "loophole" of once they were on for two years with no break in service to get hired as permanent employees, the MBTA and the union were saying that there were no more extensions. In 2011, Clark did not make a call or any efforts or behalf of Steiner and Gomes because nobody approached Clark and, furthermore, they had already been told by Guarino they were not being renewed. Clark testified that it was after this notification of nonrenewal by Guarino that the allegations and the lawsuit started.

When Gomes was asked what made him think that his contract not being renewed in 2011 had anything to do with Clark asking him for money, he responded: "Well, because - - I don't know if I can say feeling [sic] but the odds are too bad for my side because I don't have anybody to protect me. I don't have a last name. I don't have any relatives. Basically I'm no one ... ." <sup>17</sup> Gomes left in December 2011 because they laid him off. According to Gomes, Jeff Sullivan ("Sullivan"), the union business agent, was the person he spoke to in order to get hired at the MBTA, and that Sullivan and the MBTA were in charge of whether or not he got renewed.

#### **Clark's Response to the Allegations**

Clark argues that Steiner and Gomes concocted the allegations against him in an effort to get the MBTA to hire them as permanent employees. He testified that in December 2010, Steiner and Gomes became aware that another individual had just been placed on permanent employee status. Clark also testified Steiner was aware of an individual who sued the MBTA and was placed on permanent status. According to Clark, on a Friday in December 2010, while working overtime at night at the Cabot Car House, Steiner was "very upset" about the employee who had just been placed on permanent status. Clark told him that it had nothing to do with them, and that they had a job to do. Clark further testified that Steiner said "I see now the only way to get on the T permanent is to sue." Clark stated he told Steiner to let his work speak for him. Clark further testified that Steiner went "on and on" and said to Clark, "if you don't like it, you can take it further." Clark asked Steiner what he meant about that.

On the Monday following this conversation, Clark went and reported it to Miner and also called the

business agent and business manager for them to come out and have a talk with Steiner because they were all in the same union. The union officials called Clark and asked him to come down to the union hall, and Clark did so and told them what happened. The business manager said that they would talk to Steiner and that they would take care of it. Guarino, the union representative, subsequently came out and talked to Clark and James Blythe (“Blythe”), a permanent MBTA painter, separately, and then talked to Steiner and Gomes separately. Clark testified that when he asked Guarino to get everybody together to talk and hash it out and get it over with, Guarino told him no, everything was fine. From that day forward, Bobby Menyo (“Menyo”), the union steward, started meeting with Steiner and Gomes at the time clock.

Clark also testified that Blythe came to Clark and told him that “they [were] out to get [him].” Blythe told Clark that “they [were] going to say [that Clark] treat[ed] them unfairly,” and then “they changed their mind[s] and were going to say that [Clark] asked them for money.” Clark testified that Blythe said they tried to get him to go along with them. According to Clark, Steiner and Gomes made their allegations against him after Guarino came in at the end of 2010. Clark further testified that Steiner and Gomes started coming forward with their statements in 2011, but they tried to “backdate stuff” to 2010.

#### **V. Burden of Proof**

To prove the alleged § 23(b)(2)(i) violation, Petitioner must demonstrate that (1) Clark was a state employee and that (2) knowingly, or with reason to know, (3) he solicited something of substantial value, i.e., worth \$50 or more, for himself, (4) for or because of his official position as an MBTA Painters Foreman. To prove the alleged § 23(b)(2)(ii) violation, Petitioner must demonstrate that (1) Clark was a state employee and that (2) knowingly, or with reason to know, (3) he attempted to use his official position as an MBTA Painters Foreman (4) to secure for himself an unwarranted privilege or exemption (5) which was of substantial value, and (6) which was not properly available to similarly situated individuals.

Petitioner must prove each of these required elements by a preponderance of the evidence. 930 CMR 1.01(10)(o)2; *In Re Jacques*, 2013 SEC 2480, 2487; *In Re Piatelli*, 2010 SEC 2296, 2302, *aff'm*, 84 Mass. App. Ct. 1107 (2013); *In Re Maglione*, 2008 SEC 2172, 2173.

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 Re Jacques*, 2013 SEC at 2487; *In Re Maglione*, 2008 SEC at 2173.

#### **VI. Analysis of the Evidence**

To establish a violation of § 23(b)(2)(i), Petitioner was required to prove by a preponderance of the evidence that *inter alia*, Clark solicited something of substantial value for himself from either Steiner or Gomes for or because of his official position. In a similar manner, to establish a violation of § 23(b)(2)(ii), Petitioner was required to prove by a preponderance of the evidence that *inter alia*, Clark attempted to secure for himself from either Steiner or Gomes, an unwarranted privilege of substantial value.

Based on the testimony in the record, the Commission is confronted with two competing and entirely different versions of what occurred. Steiner and Gomes testified that Clark asked each of them to loan him hundreds of dollars; Clark vigorously denied doing so. Clark admitted to having only one conversation with Steiner about money, which he testified related solely to Steiner’s private side work. Steiner, however, testified that no such conversation about his private work occurred. Clark also admitted to occasionally sharing lunch money with Gomes. There was no testimony in the record from Gomes about sharing lunch money with Clark. In response to these allegations, Clark argues that Steiner and Gomes concocted the allegations against him in an effort to get the MBTA to hire them as permanent employees.

These starkly different versions of the alleged solicitations are further compounded by the lack of any independent, corroborating evidence in the record to support either the version offered by Steiner and Gomes or the version offered by Clark. For example, there is no other testimony or evidence in the record as to the reporting and/or any investigation by the MBTA or the union of Clark’s alleged solicitations of Steiner and Gomes, or as to the MBTA’s policies or procedures relating to shift changes, work allocation or renewal of temporary employees’ contracts.

Because Petitioner has the burden of proving each element of the alleged violations by a preponderance

of the evidence, the absence of independent corroborating evidence in this matter to support the allegations is fatal to Petitioner's case. In this case, where the evidence presents two competing versions of what occurred, with no independent corroborating evidence, Petitioner has failed to meet its burden of proving each element of the alleged violations by a preponderance of the evidence. "Petitioner cannot prevail 'if the question is left to guess, surmise, conjecture or speculation, so that the facts established are equally consistent [with no violation as with a violation.]'" *In Re Kinsella*, 1996 SEC 833, 835, quoting *Tartas' Case*, 328 Mass. 585 (1952). See *In Re Jacques*, 2013 SEC 2480, 2488; *In Re Piatelli*, 2010 SEC 2296, 2302, *aff'm* 84 Mass. App. Ct. 1107 (2013); *In Re Maglione*, 2008 SEC 2172, 2173. Accordingly, Petitioner has failed to meet its burden.

## VII. Order

Petitioner has failed to prove by a preponderance of the evidence that Clark violated either § 23(b)(2)(i) or § 23(b)(2)(ii). According, the allegations are hereby **DISMISSED**.

**DATE AUTHORIZED:** July 16, 2014

**DATE ISSUED:** August 11, 2014

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<sup>1</sup> Commissioner Murphy abstained from participating in this matter. Because she did not participate in all of the deliberations, Commissioner Mangum is not a signatory to this Decision and Order.

<sup>2</sup> Section 23(b)(2)(i) provides that no public employee shall knowingly, or with reason to know, solicit or receive anything of substantial value for such employee, which is not otherwise authorized by statute or regulation, for or because of the employee's official position. This provision of the law was added to c. 268A in 2009 as part of Chapter 28 of the Acts of 2009.

<sup>3</sup> Section 23(b)(2)(ii) provides that no public employee shall knowingly, or with reason to know, use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

<sup>4</sup> At the adjudicatory hearing, Clark objected to the Admissions only as to the fact that he was alleged to have "full control over setting schedules and duties" on the ground that he had denied it from the outset.

Commissioner Quinlan accepted that Admission, but permitted Clark to introduce evidence inconsistent with it, and placed the burden on him to prove it was incorrect.

<sup>5</sup> There is no testimony in the record as to which year Clark was referring.

<sup>6</sup> Clark also testified that in early 2011, when Paul Miner, the MBTA Supervisor at the Cabot Car House, called him when the allegations came forward, he told Miner about this conversation with Steiner.

<sup>7</sup> In both the Order to Show Cause and its brief, Petitioner alleges violations only as to the second request for money testified to by Gomes, an alleged \$300 loan request.

<sup>8</sup> Clark testified he did not share lunch money with Steiner because Steiner brought his own lunch to work and so he never went out.

<sup>9</sup> He also denied asking Steiner for money at that time.

<sup>10</sup> Clark testified that in early 2011, when Paul Miner, the MBTA Supervisor at the Cabot Car House, called him when the allegations came forward, he told Miner about the lunch money issue and that he had asked Gomes for lunch money. Clark further testified that his conversation with Miner occurred prior to his testimony at the Commission in January 2012.

<sup>11</sup> Gomes was working the first shift at that time because he was filling in for an employee who was out sick.

<sup>12</sup> Steiner further testified that he did not remember if his schedule changed a number of times after May 20, 2010, because he was at the MBTA for four years and did not remember every date that the schedule changed.

<sup>13</sup> There is no testimony in the record as to the reason for the timing of that report.

<sup>14</sup> Steiner testified that in response, he was sent a letter two weeks later that said they found no cause on his complaint. He further testified that he called to schedule a meeting, to talk about who did they talk to, how did they investigate it, but his call was not returned.



## **II. Procedural Background**

This matter commenced on October 22, 2013, with Petitioner's issuance of an Order to Show Cause alleging that Duarte violated G. L. c. 268A, § 19 in September 2010 while serving as a NBHA senior property manager. Duarte answered on November 11, 2013, denying most of the allegations. On January 15, 2014, Duarte made a motion to remove Petitioner's counsel, which was denied. On February 6, 2014, Duarte moved to compel Petitioner to more fully respond to interrogatories and to provide a non-redacted copy of the complaint. Respondent's motion was denied except as to one interrogatory. An adjudicatory hearing was held on August 7<sup>th</sup> and 8<sup>th</sup>, 2014. During the hearing, Duarte moved to identify the complainant and to have the complainant treated as a party opponent, again moved to remove Petitioner's counsel, and also moved to bar the Presiding Officer from participating in the Commission's deliberations. All of the motions were denied. At the hearing, fifteen exhibits were admitted into evidence, seven witnesses, including Duarte, testified and the Parties made their closing arguments before the Presiding Officer. The parties submitted their final briefs in September 2014.

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

## **III. Findings of Fact**

1. In September 2010, Duarte was employed as a NBHA senior property manager. As such, Duarte was a New Bedford municipal employee. As of September 2010, Duarte had worked for the NBHA for about twenty years.

2. The NBHA provides housing for low-income, elderly and disabled people in New Bedford.

3. As a senior property manager in September 2010, Duarte managed about 1000 units of NBHA housing in several housing developments. Duarte's duties as a senior property manager included supervision of NBHA property managers, data specialists and management aides, among other staff. In September 2010, Duarte's immediate supervisor was NBHA Executive Director Stephen Beauregard ("Beauregard").

4. As a senior property manager, Duarte regularly appeared in the housing court as the NBHA's

representative in tenant eviction proceedings. Duarte regularly was in the housing court on Fridays with the NBHA's attorney. During the relevant period, the NBHA's attorney was Natalie Cabral ("Cabral"). Duarte and Cabral appeared in the housing court on about 1,000 cases over a 5 year period.

5. As a NBHA senior property manager, Duarte had the authority and discretion to stop tenant evictions and to direct his NBHA subordinates to stop tenant evictions. Duarte was not required to seek the permission of or consult with Executive Director Beauregard or anyone else at the NBHA concerning stopping tenant evictions. As the NBHA attorney, Cabral did not have the authority to stop tenant evictions.

6. As a NBHA senior property manager, Duarte had on his own authority occasionally stopped tenant evictions prior to September 2010. Duarte required the tenants to pay part or all of what they owed at the time the evictions were stopped.

7. In September 2010, Shelley Santos ("Santos") was employed as a NBHA management aide. As such, Santos was Duarte's subordinate. Santos was directly supervised by Janet Marrero ("Marrero"). While Duarte was not her direct supervisor, Santos often consulted with Duarte and regularly reported to him what was occurring at the NBHA or any problems with tenants.

8. As a NBHA management aide, Santos's duties included collecting rents, serving 14 day notices to quit, performing home inspections and attending private conferences with tenants. Santos worked in an NBHA office along with Joan Estrella ("Estrella") and Andrea Robidoux ("Robidoux"). As a NBHA management aide, Santos did not have the authority to stop tenant evictions.

9. At all times relevant, Duarte had a brother John Duarte ("John"). In 2009 and 2010, John was a NBHA tenant. John came to be a NBHA resident because he was elderly and disabled. By all accounts, John was not a good tenant, had behavior issues and did not pay his rent on time.

10. Santos did not get along with John because she felt he was verbally abusive towards her and other NBHA staff and residents.

11. When John became an NBHA tenant, Duarte told Santos and his other staff that he did not want to be involved with his brother, and that, even though John

was his brother, he was to be treated like any other resident.

12. Duarte nevertheless became involved in John's NBHA tenancy on several occasions by: (a) prohibiting John from using the common kitchen; (b) chastising John for being rude to a NBHA commissioner; (c) speaking with other residents about their allegations that John had set off the fire alarm in his unit and, allegedly, spiked the holiday punch; and (d) generally having discussions with John when problems would arise.

13. The NBHA issued notices to quit for nonpayment of rent to John on January 6, 2010, April 26, 2010, and June 15, 2010.

14. On July 19, 2010, the NBHA filed a summary process eviction action in the Bristol Housing Court Department, Southeast Division, New Bedford (the "Housing Court") against John for nonpayment of rent.

15. On August 23, 2010, the NBHA obtained a default judgment from the Housing Court in the eviction action against John.

16. On September 2, 2010, the NBHA obtained an Execution on Judgment against John authorizing the Sheriff's Department to deliver the premises occupied by John to the NBHA. As of that date, John owed the NBHA approximately \$406.

17. Duarte knew of the problems the NBHA was having with his brother concerning John's failure to pay his rent. Duarte also knew of the Housing Court proceedings concerning John for nonpayment of rent. As the NBHA manager who attended Housing Court hearings on behalf of the NBHA, Duarte received in advance the court docket showing the NBHA cases that were going to go before the court.

18. On September 9, 2010, Lieutenant Deputy Sheriff Michael P. Young ("Lt. Young") served a 48-Hour Notice of eviction on John by leaving it at John's NBHA apartment. The Notice required John to remove all of his belongings from his NBHA apartment by 9:30 a.m. September 13, 2010. The Notice indicated that Southcoast Moving and Storage ("Southcoast") was the company used by the NBHA to remove and store items left by tenants.

19. On September 13, 2010, at approximately 9:30 a.m., Santos went to John's NBHA apartment with Lt. Young to allow him access to the apartment. John was not in his apartment. Lt. Young and

Southcoast co-owner Walter D. Moniz ("Moniz") then entered John's apartment to execute the eviction and remove John's property.<sup>2</sup>

20. Lt. Young directed the movers to begin packing John's belongings. Moniz and his employees packed John's belongings and began transferring them to the moving truck. John was not present during this process.

21. While the move of John's belongings was in progress, Santos spoke with Duarte by telephone. Santos told Duarte that John's belongings were being moved from his apartment, stating words to the effect of "your brother is being evicted. They are moving his things out. They have things on the truck." Duarte decided to stop the eviction of his brother. Duarte then told Santos to stop the removal of John's belongings and to have them returned to his apartment, stating words to the effect of "Tell them to stop! Have them take the boxes off the truck and bring them back to the apartment!"<sup>3</sup>

22. In deciding to stop John's eviction, Duarte acted as a NBHA senior property manager in his own discretion and on his own official authority. Duarte did not seek or receive permission from Beauregard or other superior NBHA management to stop the eviction.

23. Duarte was not in Housing Court on September 13, 2010, and was not in court with NBHA attorney Cabral at the time of his telephone conversation with Santos concerning John's eviction. Duarte did not talk with Cabral before telling Santos to stop the move, nor did Duarte relay to Santos Cabral's advice or decision to stop the eviction.<sup>4</sup> Cabral did not have the authority to stop John's eviction and did not advise Duarte to do so.

24. As instructed by her superior Duarte, Santos told Lt. Young to stop the eviction. Lt. Young then instructed Moniz and Southcoast to return everything from the truck to John's apartment and John's property was returned to his apartment by Moniz and his employees.

25. John did not have access to free housing in September 2010. Had Duarte not directed Santos to stop the eviction on September 13, 2010, John would have been evicted from his NBHA apartment and he would have had to find and pay for replacement housing or have been homeless.

26. Santos and NBHA residents were upset that John was not evicted on September 13, 2010.

27. Shortly after he directed Santos to stop John's eviction, Duarte met with her and her co-workers

Robidoux and Estrella at the NBHA offices. Duarte told them that Executive Director Beauregard was aware of and approved of his actions concerning his brother's eviction. In fact, Duarte had not received Beauregard's approval and did not discuss the matter with him until sometime later. Duarte testified, "It was a common practice in the housing authority to stop evictions. They happened. People – managers did it. So it wasn't anything that I had to go run to Steve Beauregard if that's what happened," and "I did not have a discussion with [Beauregard] during or after my brother's eviction. I didn't have a discussion with [Beauregard] until several weeks later about that," and "managers did not need [Beauregard's] permission to stop evictions."

28. Between September 13 and September 17, 2010, John did not pay the NBHA any of the money he owed.

29. On September 17, 2010, Santos and her supervisor Marrero appeared in Housing Court on John's case. Santos and Marrero, on behalf of the NBHA, entered into a mediated summary process agreement for judgment with John under which John was to pay the rent owed and moving fees or be evicted. The agreement - under which \$242 of the \$619.40 total John owed would be paid by Coastline Elderly Services ("Coastline"), he would be allowed to stay in his NBHA home and he would be given time to pay off his debt in \$94.35 monthly installments - was entered as an order of the court. The arrangement with Coastline was worked out on or about September 17, 2010.

30. Although he remained in NBHA housing through November and at least part of December 2010, John did not comply with the agreement. The Housing Court issued a Final Execution against John on December 27, 2010, and John eventually moved out owing the NBHA money.

#### **IV. Decision**

The Petitioner must prove its case and each element of the alleged violation 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 order to prove a § 19 violation by Duarte, Petitioner must prove that Duarte participated as a municipal employee in a particular matter in which a member of his immediate family had, to his knowledge, a financial interest. Petitioner asserts that the evidence shows that Duarte violated § 19 by, as a NBHA senior property manager, directing the NBHA staff to stop the eviction of his brother John from NBHA housing on or about September 13, 2010. Duarte asserts that the evidence shows that he did not make the decision to stop John's eviction, but instead merely passed on to NBHA management aide Santos NBHA attorney Cabral's decision to stop the eviction, and argues that, in any event, John's eviction was not stopped but only postponed and that John did not benefit financially from that postponement.

Based on the evidence in the record, we reach the following conclusions.

#### ***Duarte was a Municipal Employee***

There is no dispute that Duarte was, at all relevant times, a NBHA senior property manager and an employee of the City of New Bedford. As such, Duarte was, at all relevant times, a municipal employee as defined in G. L. c. 268A, § 1(g).

#### ***John was Duarte's Immediate Family Member***

There is no dispute that John is Duarte's brother. As such, John is a member of Duarte's immediate family as defined in G. L. c. 268A, § 1(e).

#### ***The Decision to Stop John's Eviction Was a Particular Matter***

For conflict of interest law purposes, a "particular matter" is, *inter alia*, any "decision" or "determination." G. L. c. 268A, § 1(k). Accordingly, the decision to stop John's eviction was a particular matter within the meaning of the conflict of interest law.

#### ***John had, to Duarte's Knowledge, a Financial Interest in the Stopping of His Eviction***

"Financial interest" is not defined in the conflict of interest law. The Commission has determined that "financial interest" is not limited to direct financial interests, but extends to reasonably foreseeable financial interests, large or small, positive or negative, so long as they are not remote, speculative or insufficiently identifiable. *In re Brennan*, 2009 SEC 2237, 2244.

The stopping of his eviction allowed John to remain in NBHA housing despite his owing over \$400 in back rent. Had he been evicted, John would have had to seek and pay for new housing and also pay for the cost of moving and possibly storing his possessions (or, more likely, incur additional debt to pay for those costs). John's financial interest in the decision to stop his eviction was not remote, speculative or insufficiently identifiable. These inevitable consequences of eviction gave John a financial interest in the decision to evict him of which Duarte, given his many years of experience with NBHA tenant evictions, could not have been unaware. In any case, based on the evidence, it is more likely than not that Duarte knew of his brother's financial interest in not being evicted. In addition, based on his experience, it is more likely than not that Duarte knew that John would be required to pay some portion of what he owed the NBHA in connection with his being allowed to stay. Thus, we find that John had to Duarte's knowledge a financial interest in the decision to stop his eviction.

Duarte's argument that his brother did not in fact financially benefit from the decision to stop the eviction because he was later evicted is both beside the point and without merit. The stopping of the September 13<sup>th</sup> eviction afforded John the opportunity to enter into an agreement with the NBHA on September 17, 2014 under which \$242 of the \$619.40 total he owed would be paid by Coastline, he would be allowed to stay in his NBHA home and he would be given time to pay off his debt in \$94.35 monthly installments.<sup>5</sup> This agreement with the NBHA put John in an unquestionably better position financially and physically than he would have been had he been evicted and made homeless owing the \$619.40 total in unpaid rent and fees. The fact that John was ultimately evicted several months later owing back rent and fees does not alter this fact.

#### ***Duarte Participated as a Municipal Employee in the Decision to Stop John's Eviction***

In order to have met its burden of proof, Petitioner must have proved by a preponderance of the evidence that Duarte participated "personally and substantially" as a municipal employee, "through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise," in the particular matter of the decision to stop his brother's eviction. G. L. c. 268A, § 1(j).

Petitioner asserts that Duarte personally and substantially participated in the decision to stop his brother's eviction as part of his duties as a NBHA

senior property manager. According to Petitioner, Duarte, as senior property manager, personally made the decision to stop the eviction and directed NBHA management aide Santos to do so. Petitioner asserts that this participation was substantial in that, without it, the eviction would have gone forward as scheduled. Duarte asserts that his involvement in the stopping of his brother's eviction "does not meet the standard set out in §19's definition of participation," in that he merely "relayed the instructions" of NBHA attorney Cabral to his subordinate Santos and did not participate in making the decision to stop the eviction. Duarte, as "any manager would have done under the circumstances," followed the NBHA's attorney's "directions" in a "correct and common procedure." Duarte further in effect argues that it is not credible that he intervened to stop the eviction as alleged by Petitioner because, if he had wanted to stop his brother's eviction, he would not have waited until the last moment to do so.

The preponderance of the evidence supports Petitioner. First, to the degree that Duarte's version of his telephone conversation turns on his being in court with Cabral at the time, the weight of the credible evidence contradicts Duarte's version. Although both Santos and Duarte placed their conversation during John's eviction on a Friday<sup>6</sup> (which Duarte testified was September 10, 2010) the most reliable evidence of the date of John's eviction and thus the date of the telephone conversation, the testimony and business records of the mover Moniz and the deputy sheriff Lt. Young, establishes Monday, September 13, 2010 as the date of the eviction. Moniz clearly recalled the date because it was the day before the Tuesday, September 14, 2010 election in which he was a candidate for office.

Second, and more importantly, Santos's testimony that Duarte told her to "stop the move" and to have the movers "put the boxes back" in John's apartment is credible.<sup>7</sup> By contrast, Duarte's testimony that he merely repeated to Santos what he claims Cabral said to him, "If he has the money, let him stay," is not credible.

Duarte's testimony concerning his reaction to Santos calling him and Cabral's perception of that reaction and his interaction with Santos and Cabral regarding John's ongoing eviction is not credible. First, it was not believable that Duarte would have been "flabbergasted" by Santos calling him about John's eviction at all let alone to the extent his facial reaction would have drawn Cabral's attention and inquiry about what was going on or what was wrong. Second, given that, according to the witnesses, John

was not at the eviction, it is improbable that Santos would have had a basis to tell Duarte that John, whom Santos testified she had not seen that morning, “ha[d] the money.” Third, Duarte’s testimony that he merely repeated to Cabral what he says Santos told him, “My brother is being evicted and he has the money,” and asked “What should she do?,” and then merely repeated to Santos what Cabral told him in response, “If he has the money, let him stay,” was not credible as explained above in footnote 4. In addition, given his background and nearly 20 years of NBHA management experience, as well as his observed and self-described firm personality, it is not believable that Duarte acted merely as a passive conduit between Santos and Cabral. Fourth, Duarte’s testimony is not credible given that he, not Cabral or Santos, had the authority to stop a tenant eviction.<sup>8</sup> Finally, Duarte’s testimony is not credible because as far as the evidence shows only he, not Santos or Cabral, had a motive to stop John’s eviction, i.e., to avoid having his brother forced to move from NBHA housing or even made homeless.

Accordingly, the preponderance of the evidence establishes that during the September 13, 2010 telephone conversation with his subordinate Santos that occurred while John’s eviction was in progress, Duarte said “tell them to stop” or other words to the effect of “stop the eviction” to Santos and that John’s eviction was stopped. Thus, the preponderance of the evidence establishes that Duarte personally and substantially participated in his official capacity as a NBHA senior property manager in the decision to stop his brother’s eviction (a decision in which his brother had to his knowledge a financial interest) by, in the exercise of his official authority, personally making the decision and directing his subordinate to stop the eviction. The fact that Duarte waited until the last minute to stop his brother’s eviction, while true and unexplained, does not change the fact that he stopped his brother’s eviction.

#### **Duarte’s Claims of Error**

In his Brief, Duarte asserts that the Presiding Officer erred in her rulings on three issues raised during the hearing: first, by refusing to allow Duarte to inquire into the identity of the complainant in this matter (which Duarte asserts violates his due process right to confront his accuser); second, by excluding Duarte’s evidence showing that the NBHA had stopped other evictions; and, third, refusing to allow Duarte to enter into evidence records of stopped evictions. In addition, Duarte asserts that it is error and “implicates” his due process rights to a fair hearing for the Presiding Officer to participate in the

Commission’s deliberations because a “very strong possibility exists that [Commissioner Mangum’s] participation is going to have an undue influence on the rest of the Commission.” Duarte does not support his assertions with any legal argument or citations to the record.

Duarte’s assertions of error are without merit. First, the Commission is required to keep the identity of a complainant confidential. 930 CMR 3.01(5). Thus, sustaining Petitioner’s objections to Duarte’s questioning of Santos concerning the complainant’s identity was necessary and appropriate. Duarte’s rights are protected because the Commission only considers the evidence, including witness testimony, in the record in deciding this matter and Duarte had the opportunity in the adjudicatory hearing to examine all evidence and to question each witness. Second, the evidence relating to other NBHA evictions was not relevant to these proceedings given that there is no allegation that Duarte used his position to unduly benefit his brother or to treat him better than any other tenant. In any case, Duarte was allowed to testify about other evictions stopped at the last minute. Finally, the Presiding Officer’s participation in deliberations is essential to the Commission’s making credibility assessments concerning the witnesses. Without the Presiding Officer’s input the Commission would lack critical guidance in determining which witness to believe with regard to conflicting testimony. See Craven v. State Ethics Commission, 390 Mass. 191, 199 (1983) (rejecting argument that participation by hearing officer in Commission’s final decision violated due process). Accordingly, we find that there was no error by the Presiding Officer.

#### **V. Conclusions and Findings**

For the above stated reasons, we conclude and find that Petitioner has proved by a preponderance of the evidence that Duarte violated G. L. c. 268A, § 19, in September 2010 by participating as NBHA senior property manager in the decision to stop the eviction of his brother from NBHA housing.

#### **VI. Order**

Accordingly, having found that Duarte violated G. L. c. 268A, § 19, as specified above, the Commission, pursuant to the authority granted it by G. L. c. 268B, § 4(j), hereby **ORDERS** Duarte to pay a civil penalty of \$1,000 for that violation.

**DATE AUTHORIZED:** October 16, 2014

**DATE ISSUED:** October 24, 2014

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<sup>1</sup> Section 19, in relevant part, prohibits a municipal employee from participating as such an employee “in a particular matter in which to his knowledge...his immediate family member...has a financial interest.”

<sup>2</sup> As to the date of John’s scheduled eviction, we find that the testimony by Duarte and Santos that it occurred on Friday September 10, 2010, is outweighed by the testimony of Lt. Young and Moniz, supported by their business records, that it occurred on Monday, September 13, 2010.

<sup>3</sup> We found Santos’s testimony describing her telephone conversation with Duarte to be more credible than Duarte’s testimony. This was partly based on the witnesses’ demeanor and partly on the fact that Santos’s version of the conversation is more probable than Duarte’s.

<sup>4</sup> We found Duarte’s testimony that he merely repeated to Santos during their telephone conversation Cabral’s statement “If he has the money, let him stay” to be not credible. Even if his testimony that he was with Cabral in court during his telephone conversation with Santos were believed (which it is not given that the evidence shows that the eviction occurred on a Monday rather than a Friday when Duarte and Cabral were in court), Duarte’s testimony that, in response to Santos’s call, his jaw dropped to such a degree that it caused Cabral to ask him what was wrong was not believable. Given Santos’s practice of informing Duarte directly of things happening at the NBHA and his knowledge of John’s pending eviction proceedings, her telephone call about John’s eviction could hardly have surprised let alone “flabbergasted” Duarte.

<sup>5</sup> There is no evidence that Duarte knew on September 13, 2010, that John would receive assistance from Coastline or knew what the specific terms of John’s agreement with the NBHA would be.

<sup>6</sup> Santos testified that her belief that the conversation took place on a Friday was based on Duarte’s telling her during the conversation that he was in court and the fact that Duarte went to court on Fridays.

<sup>7</sup> Santos lost some credibility by repeatedly being somewhat defensive and evasive in her answers during cross-examination. For example, Santos resisted admitting that she had any disagreements with Duarte; insisting that she always did what Duarte told her to do because he was her superior. She would not even admit to an internal disagreement

with Duarte. This did not however negate her credibility regarding the essential content of her telephone conversation with Duarte.

<sup>8</sup> Duarte also lost credibility in his testimony concerning Cabral, in which he tried to shift all responsibility for stopping John’s eviction to her. Duarte characterized Cabral as having a “legal aid mentality” which caused her to be excessively lenient on tenants. Duarte testified that other NBHA property managers repeatedly complained to him about Cabral being too lenient, even though according to his own testimony it was Duarte, not Cabral, who made the decisions. Given that Cabral handled about 1000 cases for the NBHA over 5 years, it is unlikely that she behaved as Duarte described. In addition, Duarte, contrary to his response to Interrogatory No. 18, claimed that Cabral had the authority to stop evictions (which Cabral denied). Duarte, however, inconsistently testified, “So we listened to the lawyer’s recommendation. If the lawyer made a recommendation and if the lawyer wanted to do a certain thing, that’s what we did.” Duarte also lost credibility through his response to the Presiding Officer’s direct question, “Prior to getting that phone call, did you have any knowledge that the eviction was scheduled that day?” Duarte’s response, “No, ma’am. Because in her [Santos] testimony she says, ‘By the way, your brother’s being evicted.’ So how did I know if my brother was being evicted if she says, ‘By the way, your brother’s being evicted?’” came across as protesting too much his lack of knowledge.

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 13-0005**

**IN THE MATTER OF  
ELIZABETH GORSKI**

**ORDER ON MOTION TO DISMISS**

**INTRODUCTION**

This case arises from complaints filed against Elizabeth Gorski, a Selectman in Groveland, with regard to her conduct after Groveland Police Chief Robert Kirmelewicz put her son, a police officer, on administrative leave, and, in particular, her conduct at a meeting on March 14, 2012. As testimony at an

adjudicatory hearing on this matter indicated, complaints with regard to some of the same events and subject matter were also filed against Selectmen William Darke and Donald Greaney.<sup>1</sup> Transcript (“Tr.”) 334, 400.

Investigations of the related complaints proceeded. Darke and Greaney each gave sworn interviews. Tr. 335; 400-401. Each was offered the opportunity to submit a brief statement to the Ethics Commission, and each submitted such a statement (“Statement”). Tr. 338-339; Ex. 8; Tr. 402-403; Ex. 10. By e-mail, Greaney also sent notes that he had taken at the time of one of the incidents to an Investigator at the Ethics Commission. Tr. 387, 413. The Investigator, however, apparently did not open the attachment to Greaney’s email. (Petitioner’s Opposition, pg. 14).

The Commission found reasonable cause to believe that Gorski violated G.L. c. 268A, and an Order to Show Cause was filed. No public cases were brought against Darke or Greaney.<sup>2</sup>

As preparation for the adjudicatory hearing regarding Gorski proceeded, there was extensive motion practice which focused primarily on Petitioner’s production (or refusal to produce) and/or redaction of documents. Prior to the hearing, Petitioner filed a witness list which included Darke and Greaney. Both testified at the hearing, called by Gorski rather than the Petitioner.

### **MOTION TO DISMISS**

On the second day of hearing, Gorski moved to dismiss the case on the grounds that the Petitioner had failed to produce or identify the written Statements from Darke and Greaney. Gorski’s counsel reported that he received a copy of Darke’s Statement not from Petitioner, but directly from Darke during preparation for the hearing. Tr. 287. He received Greaney’s Statement and notes directly from Greaney on the evening of the first day of the hearing. Tr. 417. Gorski complained that her right to a fair trial was violated by Petitioner’s failure to produce or even identify these documents during discovery.

At the hearing, Gorski objected that the documents pertained in particular to events involving Chief Kirmelewicz, who already had testified. Gorski asserted that she was prejudiced because, as a result of Petitioner’s failure to have produced the documents, she could not effectively cross-examine Kirmelewicz about information in them. Presiding Officer Quinlan noted that “the Chief is here in the

event that he needs to be called by either side.” Tr. 295. Neither party elected to recall the Chief.

Gorski filed a written Motion to Dismiss on May 15, 2014. In the Motion, Gorski argues that the two Statements and Greaney’s notes fell within the scope of discovery requests she made about issues relevant to the allegations against her. Gorski contends that the documents are directly relevant to the case against her and are exculpatory in that they directly refute allegations made against Gorski and contradict testimony by Petitioner’s two primary witnesses, Chief Kirmelewicz and Deputy Chief Jeffrey Gillen. In particular, Gorski contends that “Petitioner proceeded at the Adjudicatory Hearing on the theory that Gorski had abused her power as a selectwoman, and portrayed Chief Kirmelewicz as an aggrieved police officer who Gorski had tried to harm,” but “[i]n fact the documents that Petitioner withheld support Gorski’s theory that Chief Kirmelewicz filed complaints against each of the selectmen and used the [Ethics] Commission as a tool for personal gain.” (Respondent’s Memorandum, p. 10).

Gorski complains that Petitioner’s preliminary inquiry related to Gorski, Darke and Greaney, and that Petitioner could not use confidentiality requirements as a reason to withhold documents that related to her case just because cases were not eventually brought against the other two Selectmen. She contends that, especially in light of the earlier significant motion practice which focused on production and/or redaction of documents, Petitioner’s failure to produce or identify the documents was egregious, and, as previously noted, prejudicial to her case.

Petitioner responds that, by law, where a preliminary inquiry does not result in a public case against a subject, the Enforcement Division is required by strict statutory and regulatory provisions to keep the memoranda and other materials submitted by a subject confidential, so that the documents which the Petitioner refers to as “submissions” were properly withheld. In addition, Petitioner contends that the information contained in the documents already was available from other materials that Petitioner had produced. For example, Petitioner had produced Darke and Greaney’s sworn interviews. With regard to Greaney’s notes concerning his telephone conversation with Police Chief Robert Kirmelewicz, Petitioner argues that they could not be produced on grounds of confidentiality, or, in the alternative, that the failure to produce them was inadvertent. Finally, Petitioner argues that because Gorski had all of the documents and in fact used them during the

adjudicatory hearing, and the Presiding Officer gave her an opportunity to call back Chief Kirmelewicz to examine him about the documents, she was not prejudiced.

## **ANALYSIS**

### **Responsive to document requests, relevant and exculpatory**

In the Motion to Dismiss, Gorski argues that Darke and Greaney's Statements were within the scope of her discovery requests and clearly relevant to her case. In addition, according to Gorski, they contradicted allegations made against Gorski and testimony by Petitioner's key witnesses, and thus contained exculpatory information which Petitioner had an obligation to produce. These points appear to be well supported by the documents.

The Order to Show Cause ("OTSC") with regard to Gorski alleges that Gorski's son, Eric, was a police officer in the Groveland Police Department and that Police Chief Robert Kirmelewicz placed Eric on administrative leave on November 7, 2011. Employment contracts for the Chief and Deputy Chief Jeffrey Gillen were due to expire on June 30, 2012. The Selectmen were the appointing authority for Police Department personnel.

The OTSC alleges that Gorski, while serving as a Selectman in Groveland, violated § 23(b)(2), § 17, § 19 and § 23(b)(3). The allegations break down into two main categories. First, Petitioner alleges that Gorski misused her official position as a Selectman and improperly advocated on behalf of her son with Deputy Chief Gillen and a detective in the Police Department to get Eric returned to active duty. Second, Petitioner alleges that Gorski told Selectmen Darke and Greaney that she was upset about her son being put on administrative leave, improperly influencing them to take actions with regard to Eric's employment status and the renewal of the Chief's employment contract, and that she improperly met with Chief Kirmelewicz about Eric's employment status and Kirmelewicz's employment contract during executive session of a Selectmen's meeting on March 14, 2012. The documents withheld by Petitioner relate to the second set of allegations.

The Requests for Production of Documents ask broadly for "All documents in Petitioner's files concerning Respondent" and "All... witness statements prepared by, taken or received by Petitioner in connection with this matter." They specifically ask for documents relating to allegations

that on March 14, 2012, the Selectmen "held an executive session with Chief Kirmelewicz to discuss his contract," or that Gorski "allegedly participated in a meeting of the Groveland Board of Selectmen, whether an executive session or otherwise, on March 14, 2012." The Requests ask for documents about all exchanges between Gorski and Chief Kirmelewicz at the alleged meeting.

The withheld Statements were in Petitioner's files, and were witness statements received by Petitioner. Both Statements include information about the Selectmen's meeting with Kirmelewicz on March 14, 2012 and the exchange between Gorski and Kirmelewicz that evening. Consequently, the Statements fall within the scope of the Requests.

In addition, the Statements include exculpatory information. In Darke's Statement, he directly refutes allegations made against Gorski. He states that Gorski did not attempt to get Darke to coerce the Chief into bringing back Officer Gorski and that Gorski never said anything to him about not rehiring the Chief.<sup>3</sup> On this point, the Statements also contradict testimony by Chief Kirmelewicz. Kirmelewicz testified that, at a Selectmen's meeting on February 27, 2012, Darke stated that Gorski was pressuring him, but Darke, in his Statement, stated that he "was never pressured by Gorski to behave in any manner toward the Chief." Ex. 8.

A factual issue in the case is whether Gorski attended a Selectman's meeting in executive session when she came to Town Hall on March 14, 2012 and spoke with the Chief and the other two Selectmen. Minutes of a Selectmen's meeting on March 14, 2012 indicate that the Selectmen met in executive session to discuss renewal of Kirmelewicz's employment contract and include the discussion between Gorski and Kirmelewicz. Kirmelewicz testified that Gorski spoke with him at Town Hall during the formal meeting on March 14 and that the meeting at all times was in executive session.

In his Statement, however, Darke states that the March 14, 2012 meeting never went into executive session and that the conversation between Gorski and Kirmelewicz was not part of the Chief's contract negotiations and "was not regarding town business." He explains that he called Gorski down to Town Hall "to patch up a relationship." Ex. 8.

Greaney, in his Statement, likewise denies that the meeting on March 14 was in executive session and explains that the Selectmen's contract negotiations with the Chief ended before Gorski came to Town

Hall. He also explains that the discussion between Gorski and Kirmelewicz came about because Darke spoke with the Chief about “how bad this had gotten with people that were all friends.” Ex. 10.

Kirmelewicz testified that Darke and Greaney pursued a management review of the Police Department because of pressure from Gorski relating to her son’s employment situation. Darke’s Statement refers to concerns he had regarding the Chief’s performance that had nothing to do with Gorski or her son. He wrote that he was told by other people off the record about problems with the Chief and his management, and that these people would not come forward because they feared retaliation from the Chief. In particular, he mentioned that the Chief had fired one officer and had two MCAD complaints filed against the town by his employees, and that the Town was incurring thousands of dollars in legal fees and insurance premium increases defending against the MCAD complaints. Had this information been produced to Gorski during the discovery period, Gorski could have developed a defense with regard to the reasons for the management review.

Darke and Greaney’s Statements and Greaney’s notes also relate to Gorski’s defense that Kirmelewicz filed or threatened to file a series of actions with state agencies as a tool to force the Selectmen to renew his contract. Kirmelewicz testified that he felt “extorted and under duress” because Selectmen Darke and Greaney asked him to confirm that he would not file a complaint with the Ethics Commission if they invited Gorski to come to Town Hall to speak with him on March 14. Both Darke and Greaney wrote in their Statements, however, that the coercion came from the opposite direction. Darke states, “I have been continually pressured, bullied and threatened by the Chief.” Ex. 8. Greaney stated, “If anyone was threatened during the contract talks, it was me.” Ex. 10.

Greaney’s notes report that in a telephone call on March 8, 2012, Kirmelewicz said that Gorski was directing Darke about how to attack him about his contract. The notes say that Kirmelewicz threatened “terrible things” if Greaney “doesn’t hurry up and renew his contract” and an ethics complaint against all of the board if he didn’t get his contract by Friday. Greaney wrote, “After the discussion I felt I had been given an ultimatum and I now would be unethical to vote either way.” Ex. 9.

Darke, in his Statement, wrote that “[t]he Chief repeatedly stated that ‘he had nothing to hide,’ but that he wanted a new contract before he would agree

to a performance review.” Darke also reported the threat that Kirmelewicz made to Greaney. Darke wrote, “The Chief told Selectman Greaney that Selectwoman Gorski was already in trouble, and that the same thing would happen to us if he did not get his new contract.” Darke explained that in June – after the Chief’s contract already had been renewed – the Chief continued to badger him about his proposal to do a management review of the Police Department, threatened a complaint to the Attorney General, and followed up the next week with a letter to the Attorney General. Since Kirmelewicz presented himself as a victim of Gorski’s pressure, these statements in the documents withheld by Petitioner relate directly to his credibility as a witness.

### **Confidentiality obligations**

Gorski points out that the sworn interviews for all three of the Groveland Selectmen – Gorski, Darke and Greaney – have the same Preliminary Inquiry number. Even if Petitioner was conducting three investigations, Gorski contends that Petitioner should not be able to manipulate the system through its own internal, self-determined filing procedures, withholding information that relates to Gorski on grounds of confidentiality because it was provided by Darke or Greaney. Gorski argues that if Petitioner’s reason was preserving confidentiality, it was inconsistent for Petitioner to produce Darke and Greaney’s sworn interviews, but withhold their Statements and Greaney’s notes. Gorski further argues that Petitioner should have identified the documents in order to bring the issue to the Presiding Officer’s attention.

Petitioner counters that the law requires Petitioner to keep Darke and Greaney’s Statements confidential. First, Petitioner argues that, by law, the Enforcement Division must keep confidential:

All commission proceedings and records relating to a preliminary inquiry or an initial staff review to determine whether to initiate an inquiry. G.L. c. 268B, § 4(a).

All commission proceedings and records relating to a preliminary inquiry or an initial staff review where the preliminary inquiry has been terminated because it failed to indicate reasonable cause for belief that G.L. c. 268A or G.L. c. 268B has been violated. G.L. c. 268B, § 4(b)

The nature or existence of a preliminary inquiry involving allegations of G.L. c. 268A or G.L. c.

268B, or of an initial staff review to determine whether to conduct a preliminary inquiry. 930 CMR 3.01(2).

The consequences of violating the confidentiality provisions under G.L. c. 268B, § 4(a) include criminal penalties: a fine of not more than one thousand dollars or imprisonment for not more than one year, or both. G.L. c. 268B, § 7.

The Commission's Enforcement Procedures provide that, prior to submitting a preliminary inquiry report, the Enforcement Division must notify the subject of the date the Commission is expected to meet to consider whether to find reasonable cause to believe that a violation of G.L. c. 268A has occurred. They further provide, "The subject may submit a brief written memo (generally not exceeding five pages in length) to the Commission regarding the allegations." Enforcement Procedures, § 4(C).

Commission regulations provide that any Party to an adjudicatory proceeding may request that any other Party produce "any documents or tangible things not privileged, and not previously supplied, which are in the possession, custody, or control of the Party upon whom the request is made and which are relevant to the proceedings." 930 CMR 1.01(7)(b).

Petitioner argues that a "Statement" is a document made by a subject of an initial review or preliminary inquiry, so that producing a Statement from "Subject A" to a Respondent in an adjudicatory proceeding would mean disclosing to the Respondent the existence of an initial staff review or preliminary inquiry with regard to "Subject A." Petitioner maintains that this is prohibited by law, and such a Statement must be kept confidential.

With regard to why Petitioner produced the sworn interviews of Darke and Greaney but not their Statements, Petitioner explains that, unlike a sworn interview, a Statement is prepared by a subject to defend against the specific allegations as to him. Consequently, disclosing a Statement in all likelihood would confirm the existence of an investigation.

In addition, Petitioner explains that the sworn interviews of Darke and Greaney "were used in the investigation of Respondent." Because the Commission found reasonable cause to believe that Gorski violated G.L. c. 268A, the records and proceedings from the preliminary inquiry regarding Gorski, including these sworn interviews, are discoverable. However, unless the Commission found reasonable cause to believe that Darke and/or

Greaney violated G.L. c. 268A, Petitioner maintains that their Statements must remain confidential. Confidentiality protects the privacy and reputation of a subject where no case will be brought against him.

### *The Statements*

Having considered the arguments, we are not convinced that the confidentiality provisions in the statute and regulations justified Petitioner's conduct in withholding the two Statements by Darke and Greaney without even noting their existence. The mission of the Ethics Commission is to enforce the conflict of interest law through fair proceedings that provide due process to Respondents, and Petitioner, in carrying out that mission, must scrupulously play by the rules. If Petitioner conducts related investigations of more than one subject, Petitioner, to the maximum extent allowable by law, must disclose factual information provided by one subject that is relevant to a public case brought against another subject. Withholding an entire document that relates to a Respondent's case because some of the information in the document indicates that an investigation also proceeded against a different subject deprives the Respondent of information to which he is entitled during discovery. The obvious concern is that Petitioner benefits from knowing information that Respondent does not have. This advantage is particularly troublesome if the information withheld is exculpatory or unfavorable to Petitioner's case, as it is in this case. It raises the risk that Petitioner could selectively use documents which support a case against a Respondent while withholding other documents which do not.

The reality of this risk is demonstrated by the fact that, in the final witness list filed before the adjudicatory hearing, Petitioner listed Darke and Greaney as witnesses Petitioner intended to call – without having identified or produced their Statements. Had Petitioner called Darke or Greaney as a witness, Gorski, on cross-examination, potentially would have been unable to highlight facts in the Statements that were supportive of her defense. In the end, Gorski, not Petitioner, called them as witnesses, and had the benefit of the Statements only because she received them from the witnesses themselves.

In our view, Petitioner was required at least to identify the Statements in a privilege log or *in camera* to the Presiding Officer so that the question about whether they could be produced in whole or in part could be addressed. Raising the issue with the Presiding Officer on an *ex parte* basis was another

possibility. The information in the documents that had to be kept confidential was reference to any preliminary inquiry or initial staff review of either Darke or Greaney. Whether redactions would have made it possible to produce Darke and Greaney's Statements without such references should have been raised with the Presiding Officer.

There were no fewer than seventeen motions regarding discovery in this case, most of which had to do with efforts by Gorski to eliminate extensive redactions from documents which Petitioner had produced, many of which included statements by or about Selectmen Darke and Greaney. Repeated attention to these questions and repeated requests to the Presiding Officer to resolve these questions should have put Petitioner on notice that the same questions should have been addressed to the Presiding Officer about the Statements created by Darke and Greaney. Under these circumstances, the failure to disclose the Statements even to the Presiding Officer was, in our estimation, egregious.

#### ***Greaney's notes***

Greaney's notes were created by Greaney contemporaneously with events at issue in the Gorski case. The fact that the notes may have been provided to Petitioner in the course of an initial staff review or preliminary inquiry regarding Greaney's conduct does not mean that confidentiality provides a justification for withholding the notes from Gorski or failing even to disclose that they were being withheld.

Greaney testified that he attached them to an e-mail he sent to an Investigator at the Ethics Commission. Petitioner reports that the Investigator inadvertently failed to open the attachment, so that Petitioner was unaware that the notes had been received before Gorski moved to dismiss the case at the hearing. Petitioner contends, therefore, that Petitioner could not produce what it did not know it had.

When bringing a case against Gorski, Petitioner had a responsibility to know what information had been provided by witnesses about the facts and events relative to Gorski's conduct. Confidentiality would not have provided a basis for withholding the document, and the failure to have produced it cannot be excused by a failure to notice that it had been received.

#### **Prejudice**

Petitioner argues that Gorski was not prejudiced by reason of having no access to the Statements or Greaney's notes, but to find for Petitioner on this point would mean that Petitioner would benefit unduly from the fact that documents Petitioner failed to produce were made available to Gorski anyway by the authors of the documents before the case was fully tried. As mentioned earlier, having the documents during the discovery phase may well have made a difference for Gorski in refining cross-examination of witnesses or bolstering defenses.

#### **Consequence of Petitioner's failure to identify or produce the documents**

The rules governing this agency's adjudicatory proceedings provide that a Respondent may move to dismiss for failure to comply with those rules or with any order of the Commission or Presiding Officer. Gorski moves that we dismiss this case as a result of Petitioner's failure to comply with the rules regarding requests for documents. *See* 930 CMR 1.01(7)(b).

While the regulations do not provide any other specific sanctions that may be imposed for failure to comply with discovery requirements or orders, we note that "dismissal of the action or proceeding or any part thereof" is a sanction provided in the Massachusetts Rules of Civil Procedure for failure to obey an order to provide or permit discovery.<sup>4</sup> Other sanctions provided in that Rule include:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

Similar sanctions for failure to obey a discovery order are provided by regulations governing adjudicatory proceedings of state agencies bound by the mandate of G.L. c. 30A.<sup>5</sup> *See* 801 CMR 1.01(8)(i).

In determining what the consequence of Petitioner's failure to produce or identify the documents should be, we note that dismissal is a drastic sanction, and that "our system favors the substantive resolution of disputes on the merits in most instances." *Grassi Design Group, Inc. v. Bank of America, N.A.*, 77 Mass. App. Ct. 456, 461 (2009). The better approach

would be to fashion a sanction that is tailored to the disadvantage visited on Gorski by reason of Petitioner's failure to produce the specific documents. *Id.* at 460.

This case is unusual in that the failure to produce documents came to light during the course of an ongoing hearing. The motion to dismiss and the case on the merits are simultaneously before the Commission.

Our review of the evidence at the hearing indicates that Petitioner has failed to prove by a preponderance of the evidence the claims under § 23(b)(2), § 17(c), § 19 and § 23(b)(3) to which the documents which Petitioner failed to disclose relate. Specifically, we have found that Gorski did not violate these provisions through her conduct in relation either to Selectmen Darke and Greaney or to Chief Kirmelewicz, or her activities during a discussion with these individuals on March 14, 2012. Details regarding this conclusion are included in a Decision and Order that has been issued contemporaneously with this Order. Under these circumstances, we are conscious that dismissing or otherwise issuing an appropriate narrower sanction on the basis of Petitioner's discovery error rather than reaching a resolution of these claims based on the evidence would compound the unfairness to Gorski by depriving her of a decision on the merits.

Accordingly, in light of the conclusion we have reached on the merits, the Motion to Dismiss is moot insofar as it relates to these claims. We are issuing this Order on the Motion to Dismiss notwithstanding its mootness to state explicitly that we reject the argument that Petitioner's actions were justified by applicable confidentiality requirements and to emphasize that Petitioner was required both by our rules and by due process to raise issues about the confidentiality of documents with the Presiding Officer.

As noted previously, the documents which Petitioner failed to disclose do not relate to the claims based on the allegations that Gorski improperly contacted Deputy Chief Gillen and a detective about her son's employment situation. The Motion to Dismiss is denied as to these claims, which are also decided on the merits in the separate Decision and Order. (See OTSC, paragraphs 10-15).

## **CONCLUSION**

Accordingly, we hold that Gorski's Motion to Dismiss is **MOOT** in part, and **DENIED** in part, to the extent explained above.<sup>6</sup>

Commissioner Quinlan (concurring): I concur with the conclusion reached by my fellow Commissioners that Petitioner has not proven by a preponderance of the evidence the claims under § 23(b)(2), § 17(c), § 19 and § 23(b)(3) regarding Gorski's conduct in relation to Selectmen Darke and Greaney and Chief Kirmelewicz. I specifically find, however, that Petitioner's discovery error provides a separate basis for dismissing these claims with prejudice.

**DATE AUTHORIZED:** November 20, 2014

**DATE ISSUED:** December 11, 2014

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<sup>1</sup> There was no evidence about when the complaints were filed with the Ethics Commission. Darke testified that in June or July, 2012, he learned that two complaints were filed against him. One complaint was about "the handling of the Officer Gorski situation" and "the second one stemmed from the March 14th meeting." Tr. 334. Greaney also confirmed receiving complaints. Tr. 400.

<sup>2</sup> The only information about this at the hearing was that Greaney got a letter back from the Ethics Commission "stating that I wasn't found to have done anything wrong." Tr. 414. Otherwise, there is no indication about why no cases were brought, whether because the Commission found no reasonable cause to proceed or otherwise.

<sup>3</sup> Darke wrote: "During our contract negotiations, the Chief said on many occasions that he knew that Selectwoman Gorski was trying to cost him his job. I told him that I had no knowledge of that. I told him that Selectwoman Gorski never said anything to me about not rehiring him. I told him that I was doing my job as I always had. I am my own person, and he was wrong. I told him that I was not trying to cost him his job." Ex. 8.

<sup>4</sup> See, e.g., *Roxse Homes Limited Partnership v. Roxse Homes, Inc.*, 399 Mass. 401 (1987) (entry of final judgment against party was justified after repeated non-compliance with judge's discovery orders); *Greenleaf v. Massachusetts Bay Transp. Authority*, 22 Mass. App. Ct. 426 (1986) (twenty-month course of incomplete responses to discovery requests and orders, especially after first default judgment was lifted, warranted dismissal); *Maywood Builders Supply Company, Inc.*, 22 Mass. App. Ct. 944 (1986) (dismissal after party failed to respond to

orders to produce documents was not precipitously entered); *Gos v. Brownstein*, 403 Mass. 252, 255 (1988) (plaintiff's failure to attend a deposition could justify dismissal, but case was remanded in absence of finding about whether failure to attend was due to an inability to comply or to willfulness, bad faith or fault).

<sup>5</sup> The regulation at 801 CMR 1.01(8)(i) provides that a Party may file a motion to compel discovery if a discovery request is not honored, or only partially honored, or interrogatories or questions at deposition are not fully answered. If the motion is granted and the Party fails without good cause to obey an order to provide or permit discovery, the Presiding Officer may make orders in regard to the failure "as are just", including:

1. An order that designated facts shall be established adversely to the Party failing to comply with the order; or
2. An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.

<sup>6</sup> Commissioner Murphy abstained from participating in this matter. Commissioner Mangum participated in the deliberations, but is not a signatory to this Order because her term ended before it was issued. Commissioner Mills did not participate in the deliberations.

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.**

**COMMISSION  
ADJUDICATORY  
DOCKET NO. 13-0005**

**IN THE MATTER OF  
ELIZABETH GORSKI**

Appearances: Karen Gray, Esq.  
Counsel for Petitioner

Mark D. Smith, Esq.  
Marc Laredo, Esq.  
Counsel for Respondent

Commissioners: Barbara Dortch-Okara, Ch.,  
William J. Trach and Regina L. Quinlan<sup>1</sup>

Presiding Officer: Commissioner Regina L. Quinlan

**DECISION AND ORDER**

**INTRODUCTION**

The Order to Show Cause ("OTSC") in this case alleges that Respondent Elizabeth Gorski ("Gorski"), a Selectman in Groveland, repeatedly violated four provisions of the conflict of interest law after Robert Kirmelewicz ("Kirmelewicz"), Chief of the Groveland Police Department, placed her son, Eric, a police officer, on administrative leave on November 7, 2011.

First, the OTSC alleges that Gorski violated § 23(b)(2)(ii) by calling or speaking personally with police officers and her fellow Selectmen to advocate for returning her son to active duty. Specifically, the OTSC alleges that Gorski used or attempted to use her official position as a Selectman when she engaged in the following conduct:

- a) Advocated for her son with Deputy Chief Jeffrey Gillen ("Gillen") on multiple occasions, stating a number of times that employment contracts for him and the Chief were coming up for renewal; and
- b) Advocated for her son with a detective, James Morton;
- c) Told the other two Selectmen, William Darke ("Darke") and Donald Neil Greaney ("Greaney"), that she was upset about her son being placed on administrative leave; and
- d) Spoke directly with Chief Kirmelewicz about her son's situation during executive session of a Selectmen's meeting on March 14, 2012.

The OTSC further alleges that the actions described above violated § 17(c) in that Gorski acted as her son's agent in connection with a matter in which the Town was a party or had a direct and substantial interest.

In addition, the OTSC alleges that Gorski violated § 19 by participating in her capacity as a Selectman in the decision whether to restore her son to active duty, a matter in which her son, an immediate family member, had a financial interest.

Finally, the OTSC alleges that, by acting officially as a Selectman in the ongoing controversy as to whether her son should return to active duty and in the

contract negotiations regarding the chief of police while her son had a pending personnel action before the chief, Gorski knowingly or with reason to know acted in a manner that would cause a reasonable person to conclude that her son could improperly influence her or unduly enjoy her favor in the performance of her official duties in violation of § 23(b)(3).

As explained below, we find that Petitioner has proved that Gorski violated § 23(b)(2)(ii) when she spoke with Deputy Chief Gillen about her son's employment situation at a restaurant in Georgetown on January 26, 2012 and threatened to take action with regard to Gillen and Chief Kirmelewicz's employment contracts. Otherwise, we find that Petitioner has not proved any other allegations by a preponderance of the evidence.

### **PROCEDURAL HISTORY**

Petitioner, the Enforcement Division of the State Ethics Commission, filed the OTSC on March 27, 2013. An adjudicatory hearing was held on April 30 and May 1, 2014.

At the beginning of the second day of hearing, Gorski moved to dismiss the case on the grounds that during the discovery phase, Petitioner had failed to produce certain documents created by Gorski's fellow Selectmen, Darke and Greaney. Both Darke and Greaney testified that Ethics Commission investigations had proceeded against them, both with regard to their conduct in relation to "the handling of the Officer Gorski situation" and with regard to the March 14, 2012 discussion between Gorski and Kirmelewicz, but no cases were filed against them. While the investigations were pending, Darke and Greaney each submitted a statement to the Ethics Commission ("Statement") and Greaney sent an e-mail to an Investigator at the Ethics Commission attaching notes of a conversation he had with Chief Kirmelewicz on March 8, 2012. Gorski obtained these Statements and notes from Darke and Greaney directly while preparing for the hearing – receiving Greaney's documents on the evening of the first day of the hearing.

Decision on the motion was deferred, and the adjudicatory hearing proceeded to completion. Gorski introduced the Statements and Greaney's notes into evidence. The full Commission heard arguments on the Motion to Dismiss as well as closing arguments in the adjudicatory hearing on September 18, 2014. A decision on the Motion to

Dismiss has been issued contemporaneously with this Decision and Order.

### **UNDISPUTED FACTS**

Elizabeth Gorski was a Selectman in Groveland in 2011 and 2012. She received a summary of the conflict of interest law on December 17, 2009, and completed on-line training with regard to that law on December 17, 2009 and March 2, 2012.

In 2011 and 2012, the other two Selectmen were Darke and Greaney.

The Selectmen were the appointing authority for all police officers in the Groveland Police Department ("GPD"). In 2011, the Chief of the GPD was Robert Kirmelewicz and the Deputy Chief was Jeffrey Gillen. Each had a three-year employment agreement that was going to expire on June 30, 2012. The agreements included a clause stating that six months prior to the expiration of the contract, negotiations would begin with regard to the next employment contract.

Gorski's son, Eric, was a police officer in the GPD in 2011. On November 7, 2011, Chief Kirmelewicz placed Eric Gorski on administrative leave. Thereafter, he was relieved of all of his police duties and was not eligible for assignments or promotions and could not work details.

Chief Kirmelewicz sent a letter to the Board of Selectmen advising them that he had placed a full-time police officer on administrative leave, without naming the officer. Selectman Greaney subsequently called the Chief and found out that the officer was Eric Gorski.

Eric Gorski was placed on sick leave in January, 2012. He was returned to active duty with the police force on July 13, 2012.

### **EVIDENCE**

#### **Gorski's Conversations with Deputy Chief Gillen**

##### **November 7, 2011.**

On the night of November 7, 2011, after learning that her son was placed on administrative leave, Gorski called Deputy Police Chief Gillen. According to Gorski, Gillen was a "good friend." Both Gorski and Gillen testified that Gorski wanted to know "what was going on" with her son.

Gillen testified that during the phone call, Gorski said, "I was told not to call you, but I'm going to. I want to talk to you." Gillen testified that Gorski was very upset and not happy with the Chief.

According to Gorski, Gillen told her that the chief had made the decision to put Eric on administrative leave, and that Gillen didn't necessarily agree with it.

Chief Kirmelewicz told his officers that he does not want them talking to the Board of Selectmen about police matters. After speaking with Gorski on November 7, Gillen reported to the Chief that he received a phone call from Gorski.

#### **December 3, 2011.**

On December 3, 2011, Gorski went to the police station to talk to Gillen about Eric's situation. Gorski testified, "I just wanted to ask him a couple of questions because Eric wasn't sharing information with me, and I know Eric and Jeff are good friends." She explained, "We talked about what was happening. I said Eric's not telling me anything.... Maybe you can help me understand what's happening."

According to Gillen, Gorski related her concerns with her son being out of work and said that she "wanted me to fix it, wanted him back." Gillen stated, "She wanted him back to work was something she said many times." Gillen testified that Gorski made negative comments about the Chief. She said, "He's the problem. He doesn't know how to treat people. He's a bully." Gillen testified that Gorski ended the conversation by saying, "You know, you have to come before the board for your contracts and appointments."

Contradicting Gillen's account, Gorski testified that, on December 3, she never discussed the Deputy Chief's or Chief's contracts.

#### **December 4, 2011**

Gillen is the emergency management director for the Town of Groveland. Gillen received a call from Gorski the next day at the police station. He testified, "And she said, 'You know, when I was in yesterday to see you, we were talking about emergency management stuff,'... She said, 'That's why I was in to talk to you, about emergency management.'"

#### **Other contacts with Gillen**

Gillen testified that he received "many calls, several calls" from Gorski – "at least ten" – and that "[t]hey were usually pretty threatening and intimidating." He testified, "She said that she wasn't happy. She wanted me to fix it. She wanted her son back to work. That the chief was more the problem. That she had the votes of the Board of Selectmen when it came to issues involving her son. A couple of times she mentioned our contracts and our negotiations or appointments were coming up." Gillen testified that he felt "threatened" and "very uncomfortable" and that it was "intimidating." Gillen reported these conversations to the Chief.

#### **January 26, 2012 – Coach's Restaurant.**

Gillen testified as follows. On January 26, 2012, Gillen was at Coach's Restaurant in Georgetown with a friend, Don Cudmore. Cudmore and Gillen were best men at each other's weddings. At the time, Cudmore was a lieutenant for the Georgetown Police Department, and now is its chief.

Gillen described what happened at the bar. He saw Eric Gorski leaving from the other side of the bar and said to Cudmore, "Oh, there goes Eric Gorski." Elizabeth Gorski then came up to Gillen and said, "I can read lips, you know." She started asking me about Eric. I said, "Well, how are things going with you?" She said, "Not good when people are making accusations about you," with her son. And I said, "Betty, nobody would be saying anything bad about Eric. Everybody likes him. We all want him back to work." She went on to make some comments about the chief. Then she said, "I suppose you're going to report that I talked to you to your buddy Bob [Kirmelewicz]?" And I said, "Yes, Betty, I told you I'm going to report – that I'm supposed to report things to the chief. I am going to do that. I told you that."

After some comments by Cudmore, the conversation proceeded as follows, according to Gillen:

At that point, she was tapping her finger aggressively on the bar, very agitated. Was saying he has no right treating people the way he does, telling people who to go out to eat with, putting postings in the police station. I said, "Betty, if you have a problem with the chief, you should talk directly to him..." I went on and said, "I know you're going to think I'm a bad guy now, but if I go along with you, what you want me to do, you're going to wake up some day and see I'm a bad guy." I said, "I'm not doing that. I'm going to do the right thing."

That really irritated her. She was banging her finger on the bar saying, "You call this doing the right thing?" And I said, "Yes, I want to help Eric, and I'm trying to do the right thing." She then ended the conversation with saying that, "I may not be able to sign the payroll, but your appointments and contracts are coming up, and I'm going to invoke the rule of necessity." And I said, "Well, good, Betty, you should."

In notes he made about the conversation, Gillen wrote that Gorski said, "I can be involved in some of the votes and contracts coming up."

Gillen described Gorski's tone during the conversation as "Very aggressive, intimidating. Very threatening and upsetting to me." He explained that he was intimidated because he thought his job was on the line.

Cudmore testified that Gorski was the first to bring up the subject of Eric. He explained, "They were talking about Officer Gorski had been placed on administrative leave. So they were talking about whether it was appropriate he was on leave..." He recalls Gorski said "[t]hat it was wrong what was going on with Eric, and that she would have to invoke the rule of necessity pursuant to the contracts between the deputy and the police chief." Cudmore described her tone as "pointed." Cudmore offered his opinion that with regard to the Board of Selectmen, "if there's a conflict... It's not just as easy as invoking the rule of necessity. There's a process for it." He observed that, after the conversation, Gillen "was clearly upset."

Gorski reported the following about the same conversation. She heard Gillen say, "oh, there[s] Eric Gorski. And I kind of made a joke, I said yeah, and here's Betty Gorski". She said to Gillen, "I don't know, Jeff, what's happening; Eric tells me nothing... what's the conclusion of all of this?" Gillen said, "Betty, I never would have done this." She testified that a woman began chatting with Gillen. After that, Gorski did not have any further conversation with Gillen. Her testimony did not include any mention of the contracts for Gillen or the Chief or of the rule of necessity.

#### **Gorski's Conversation with Detective James Morton**

In 2011, James Morton was a detective in the Groveland Police Department and the union steward for the Groveland Police Union. He testified as follows about an incident in which he had contact

with Gorski about her son's administrative leave. Morton was working a shift in uniform in a cruiser in the center of town. Gorski spotted him, stopped and asked him "if I thought that the union was doing everything they should for Eric." Morton said yes. He said to let him know if there's anything else that he needed to do or if Eric needed anything. Morton did not consider the conversation threatening in any way. He thought it was concern that a mother was expressing for her son.

The Chief asked Morton to write a report about this. At the hearing, Morton confirmed that he wrote: "At no time did Selectman Gorski and I discuss anything concerning her son's circumstances." He also wrote, "At no time did Selectman Gorski say or do anything to me I considered to be intimidating towards me." The report was not introduced as an exhibit.

Gorski testified that she talked to Morton "about how Eric is and what's going on." Gorski testified that she was not trying to influence Officer Morton when she had that discussion.

#### **Gorski's Conduct with Regard to the Chief and Deputy Chief's Employment Contracts**

##### **January 30, 2012 meeting.**

The BOS had a meeting on January 30, 2012. This meeting occurred four days after Gorski's conversation at Coach's Restaurant with Gillen. The executive session minutes indicate that the Board of Selectmen had planned to go into executive session to discuss contract strategies for the Chief's and Deputy Chief's contracts.

Previously, Gorski had a policy of abstaining from police matters. At the meeting on January 30, 2012, Gorski announced that she wanted to participate as a Selectwoman in police personnel matters. She specifically indicated that she wanted to participate in the Chief and Deputy Chief's contract negotiations. Gorski told the Board that she had filed a § 23(b)(3) disclosure which she believed would allow her to participate in such matters. The disclosure discloses that she is the mother of GPD Police Officer Eric Gorski, but makes no reference to the fact that her son was on sick leave from the GPD. Selectmen Darke and Greaney voted to schedule contract negotiations for four weeks later to allow Gorski to receive a ruling from the Ethics Commission.

Gorski called the Ethics Commission on January 31, 2012 and had a discussion with Attorney David Wilson, Deputy Chief of the Legal Division. She

told him she was on the Board of Selectmen in Groveland and was a police officer's mother. From Gorski, Atty. Wilson understood that her son was on sick leave against his wishes, and that he had a dispute with the Chief about it. Gorski indicated that she wanted to participate in negotiations about the Chief's employment contract.

In a data entry, Atty. Wilson wrote that it does not appear that Gorski's son has a financial interest in whether the Chief is re-hired. Wilson advised Gorski that she could not participate in negotiations about the Chief's employment contract unless she filed a full written § 23(b)(3) disclosure. According to Wilson, the fact that her son was on sick leave was one of the relevant circumstances that would have to be disclosed in Gorski's §23(b)(3) disclosure. This was confirmed by the last line in his data entry: "Given that EG states that she does not want to disclose her son's sick leave issue, EG must abstain from participating in the Chief's contract renewal." Exhibit ("Ex.") 4.

Gorski testified that after the discussion with Wilson, she decided it was not in her best interest to participate in the contract negotiations, and she did not get involved with the negotiations of the chief and deputy chief's contract at all.

#### **Gorski's Communications with Selectmen Darke and Greaney**

Selectman Darke testified that he and Selectmen Greaney had several meetings with the Chief about Eric Gorski. Gorski did not participate in any of those meetings because she had to recuse herself. In his Statement, Darke wrote, "...I told the Chief that, even though I felt that he had handled it poorly, now we needed to follow the process." Ex. 8. He outlined some steps and meetings that took place after Officer Gorski was put on administrative leave. Gorski was not involved at any point.

Gorski testified that she had no conversations with Selectmen Darke and Greaney about Eric's situation, but that they could see that she was very upset. She also testified that she told Darke and Greaney, each maybe twice, that she was upset about Eric's situation. She admitted that she spoke to Darke about Eric's situation about not being at work and spoke to Greaney about Eric being on administrative leave.

Gorski testified that she never tried to influence the other Selectmen in their actions dealing with Eric's administrative leave. Darke also testified that Gorski did not influence him or attempt to influence him in

any way whatsoever in connection with her son Eric's situation.

After Gorski consulted with the Ethics Commission and elected to recuse herself, she did not attend the following Selectmen's meetings at which police matters or the renewal of the Chief's and Deputy Chief's employment contracts were addressed: meetings on February 6, February 27, and March 5, a posted meeting which was a tour of the police station on March 30, or a meeting on April 26 when Selectmen Darke and Greaney renewed the Chief's contract. Gorski did not vote on or sign the Chief's contract. Her conduct with regard to a meeting on March 14, 2012 will be discussed below.

Gorski testified that she never tried to influence Selectmen Darke and Greaney in their actions involving negotiations of the contracts with the Chief or Deputy Chief. Darke and Greaney each testified that Gorski did not at any time influence him or attempt to influence him in any way whatsoever in connection with the Deputy Chief's contract and did not participate in any manner whatsoever in connection with that renewal. Darke additionally testified that Gorski did not contact him in any way regarding the Chief's contract, and that he did not have any conversations with Gorski about the renewal of the contract. In his Statement, he wrote that at no time did Gorski attempt to get him to coerce the Chief into bringing back Officer Gorski.

#### **Subsequent meetings regarding the employment contracts**

##### **February 6, 2012 meeting.**

On February 6, 2012, the BOS held another meeting. The minutes indicate that Selectmen Greaney and Darke discussed "a few issues" with Chief Kirmelewicz, and then "asked the Chief to keep the Selectmen's Office informed of any future issues and asked that he not take immediate action until he talks with the Board." An annual review was required in the Chief's contract, and Darke told Kirmelewicz that they had been remiss in conducting it and would be doing that going forward.

##### **Kirmelewicz's actions after the February 6 meeting.**

On February 9, three days after the meeting, Kirmelewicz met with John Blodgett, the District Attorney for Essex County. According to the Chief, the point of the meeting was to ascertain whether Gorski was committing criminal conduct. Blodgett

told Kirmelewicz he was not going to take any action.

### **February 27, 2012 meetings**

On February 27, 2012, Gillen was scheduled for contract negotiations with the Selectmen a half hour ahead of Chief Kirmelewicz. Gillen testified that when he arrived for his appointment, the Selectmen were still meeting. He explained, "I know Betty doesn't sit in on our negotiations or my negotiations. So I waited outside for them to finish their business. I was down the hallway so I wouldn't have an encounter with Betty." He testified:

As she came out, she stopped and she looked down the hall where I was. Shaking her head with a smile on her face saying, "It's too bad." I walked up and I said, "What's too bad, Betty?" She said, "All this, it's sad." I said, "Yes, it is." She then walked away....

Gillen sent a text to Chief Kirmelewicz, saying he thought he was just threatened.

The following exchange took place at the hearing:

HEARING OFFICER QUINLAN: Why did you take that as a threat?

THE WITNESS: Because I was going in for my contracts and she was smirking at me saying, "It's too bad."

Gorski also testified that on February 27, 2012, she walked out of the Selectmen's meeting, met Gillen, and said, "This is so sad, Jeff." She testified that she was not threatening Gillen in making that statement. She explained, "...it was like we've always been friends and now we - it's so strained with our relationship." It was said "[b]ecause we were all close friends" and "[w]e weren't talking as frequently as we had..."

Selectmen Darke and Greaney met successively with Deputy Chief Gillen and Chief Kirmelewicz about the renewal of their employment contracts. At each of the meetings, Darke said that he thought the Selectmen should hire an outside evaluator to do a review of the Police Department before either contract was renewed.

Gillen testified about his meeting:

... the first thing Bill Darke said to me was, I'm not prepared to negotiate with you tonight." As I

said before, I almost fell off the seat. I was in shock after what Betty had just said to me to come in and being prepared to negotiate my contract and not expecting any problems....

Bill Darke explained to me that he's getting a lot of pressure from Betty. That she's really upset what's going on with her son Eric. And that they're talking about doing a review of the police department.

Kirmelewicz testified about his meeting:

Selectman Darke said that, "We were not prepared to negotiate with you tonight. We want to do a management review of the police department." And I stated, "Is there a reason? Can you tell me why?" And he said, "We're under a lot of pressure from Betty about what's been going on with her son." So I said, "Well, is there a reason, you know, that this would be holding up my contract?" I said, "Have I done anything wrong? Have I had any complaints filed against me?"

They said no.... Selectman Darke specifically said, "You're not getting it. Do you know how much pressure we're under from her?" So I plead my case and tried to talk about negotiating my contract, and they weren't receptive to it at all. They told me they didn't like the decision that I had made involving Officer Gorski.

As noted above, both Gillen and Kirmelewicz testified that Darke mentioned pressure from Gorski at the meetings. The minutes of the two February 27, 2012 meetings, however, do not include any comments by Darke about being pressured by Gorski. In addition, Darke testified that, at the February 27, 2012 meetings, he did not make a statement to either the Deputy Chief or the Chief that he was under pressure from Gorski.

Darke also testified that the management review was his idea, and that no outsider suggested it to him. Darke explained at the hearing that he runs a small business and does reviews occasionally of his employees. He explained that over the previous year and a half, there had been a number of issues or incidents with the Police Department, "each one on its own not a big deal ... but when I start putting a few things together," a review "seemed like a wise thing to do." He said, "...[w]e have one officer we terminated; we had another officer who filed an MCAD complaint against us; we had another officer being put out for paid administrative leave." In his

Statement, he wrote that he thought a performance review would be in order because he “had been told by other people off the record about problems with the Chief and his management,” and that “[t]hese people would not come forward because they feared retaliation from the Chief.” He mentioned that they were “incurring thousands of dollars in legal fees and insurance premium increases defending the town against these MCAD complaints.” Ex. 8. He asked, “... as the Chief’s supervisor, am I not allowed to ask for a review in light of this?” Ex. 8.

The meetings with Gillen and the Chief on February 27, 2012 had two different outcomes. Gillen argued that he was not the chief, and that his contract renewal should not be tied to a review of the department. Darke agreed, and he and Greaney voted to renew Gillen’s contract.

Kirmelewicz testified that the two Selectmen told him that they should have been informed and consulted before he made a decision about Officer Gorski. They said that he would hear at a future date about a management review of the police department before they could discuss his contract any further. Kirmelewicz said he had no problem with an outside evaluation of the police force “[a]fter I received my three-year contract.” Darke similarly noted in his Statement that “[t]he Chief repeatedly stated that ‘he had nothing to hide,’ but that he wanted a new contract before he would agree to a performance review.” Ex. 8.

### **March 5, 2012 meeting**

Kirmelewicz testified that he subsequently requested a follow-up contract negotiation. The BOS met on March 5, 2012. Kirmelewicz had prepared a two-page list of questions and statements relative to the management review that the BOS wanted to do. He asked to read it into the minutes in executive session. His questions included “Why are you doing this management study? This has never been done in the history of the police department.” “Even in the previous administration, there were corruption allegations. There was never any type of management review or study done then.” He testified that the Selectmen did not answer his questions, and he was told, “We’re getting a lot of pressure from Selectwoman Gorski.”

Darke testified that on March 5, 2012, the Chief accused him and, he thinks, also Selectman Greaney about being influenced by Gorski. At the meeting, Darke told Kirmelewicz “that it wasn’t true; that I’ve never played politics with anything. I served a lot of

time on the board of selectmen, and it was always one issue at a time. And – and I wasn’t influenced by anybody.” They did not agree to a contract with the Chief at the end of the meeting.

### **Kirmelewicz’s actions after the March 5 meeting**

On March 7, 2012, Kirmelewicz filed a complaint with the State Ethics Commission. In the letter, he talks about “malicious manipulation” by Gorski and “a reign of terror” at the Police Department as a result of Gorski’s efforts. He wrote that both of the other selectmen are intimidated by Gorski.

Kirmelewicz testified that he subsequently threatened a complaint against Greaney and the other Selectmen. The next day, on March 8, 2012, Kirmelewicz called Selectman Greaney and advised him that he felt he was being treated unethically during his contract negotiations and was compiling a complaint to the Ethics Commission that he would file if this did not go right.

Kirmelewicz testified that, on the phone, Greaney said that he had been receiving calls from Selectwoman Gorski about the evaluation (i.e., the management review). According to Kirmelewicz, Greaney did not agree with the evaluation and said that it was a waste of time and money, and that he told Gorski he did not want to play this game.

Greaney testified about the same conversation, and notes that he prepared immediately after the conversation include information about it. Greaney’s testimony and notes include nothing about any phone calls from Gorski about the evaluation and do not indicate that he disagreed with the evaluation.

About the Chief, Greaney recalled:

He said that he had been advised by his attorney that he should contact the more reasonable selectman to let me know that if I didn’t finalize his contract, bad things were going to happen to Bill and I, and he was already going after Selectwoman Gorski, and he would drag us into the situation, and terrible things were going to come from it.

In his notes, Greaney wrote that Kirmelewicz acknowledged that Greaney and Darke had every right to do an evaluation of him and his department, and that it was fine as long as he got his contract Friday, otherwise he was going forward against all of the board.

Greaney regarded the chief's statement as a threat. He felt he was given an ultimatum that if he didn't give Kirmelewicz his contract, Kirmelewicz was going to file charges against him with the Ethics Commission and "I now would be unethical to vote either way." Ex. 9. Greaney described it as a "bullying situation."

Greaney testified that, on the day after the phone call, Kirmelewicz called him and apologized for the wording that was used.

### **Meeting on March 14, 2012**

On March 14, 2012, Selectmen Darke and Greaney met with Chief Kirmelewicz, and Administrative Assistant Nancy Lewandowski took the minutes.

According to the minutes, at the beginning of the meeting, Greaney stated he felt he had been threatened by Kirmelewicz the previous week.

The minutes state that, in reply:

Kirmelewicz told Darke that one of his attorneys had advised him to let the Selectmen know what was going on with his men being contacted by a Selectman; that he told Selectman Greaney that he had conducted an internal investigation with all of his officers and at least four of them admitted being contacted and talked to about her son. Kirmelewicz explained to Darke that he was following his counsel's advice and was not trying to threaten anyone but was told to tell someone on the Board that they (Selectmen) could all be in trouble if reported to State agencies." Ex. 1L.

The minutes state that Selectman Darke told Kirmelewicz "that he wants all the nonsense that has been going on to stop; that he would prefer that Selectman Gorski not get into trouble and that all parties get back to where they were before; that we need this all to end now; and that he is willing to talk to Selectman Gorski and tell her not to be talking to the police officers about department business." Ex. 1L.

The minutes state, "Selectman Greaney stated that Officer Gorski was at his work place last Friday telling him various things that he feels had gone on and Greaney stated he told Officer Gorski he can't make decisions based on anything other than facts. Darke told the Chief that he resents the fact that he or anyone else thinks that Selectman Gorski is making a decision for him; that he will tell Selectman Gorski

that he is following a process." Ex. 1L. In the minutes, on two occasions, Darke stated that "Selectman Gorski has no influence over him or the decisions he makes" and that "nothing any of the Gorskis' [sic] say to him are going to affect his decision." Ex. 1L.

Darke similarly testified that they talked about the performance evaluation, and the Chief reiterated that he thought that Darke was being influenced by Selectman Gorski. Darke testified that this wasn't true. He testified that he said, "[N]o matter what you think you may have heard... I'm just here to do a job. I'll do my job like I've always done my job."

### ***Discussion about inviting Gorski***

At this point, accounts differ about whether and how the meeting proceeded. The minutes continue on without a break.

Darke told Kirmelewicz that he does not feel giving him a new three year contract will fix the current problem; that he wants to mend the relationships and would like all parties to sit down and talk as people who know each other should. Kirmelewicz stated everyone wants Officer Gorski to get the help they feel he needs and to return to work; that he felt if Eric had done what the doctor recommended, he would already be back to work.

Selectman Darke asked if he called the Gorskis now and they were willing to come to the meeting would Kirmelewicz be willing to try to talk things out and the Chief said he would. Darke called and Selectman Gorski came to the meeting and stated that Eric Gorski was at a Conservation meeting regarding his lot of land. Ex. 1L.

The minutes indicate that the discussions that next took place with Gorski present were part of the executive session.<sup>2</sup>

Kirmelewicz testified that Greaney and Darke said at the meeting that they were not happy how he had proceeded with the situation with Officer Gorski and wished that he had consulted with them prior to making any moves. Kirmelewicz testified, "And Selectman Darke stated how he just wanted everyone to get along. He specifically stated to me that I cannot reappoint you until we get the situation with Officer Gorski resolved." Kirmelewicz says he asked what this had to do with his contract. He testified:

So at some point the conversation went to Selectman Greaney suggesting that

Selectwoman Gorski come to my contract negotiation meeting and we sit and try to talk this subject out and come to a resolution. So at that point Selectman Darke said, "Well the chief will have to agree not to turn us into ethics." And, of course, at that point I felt like I was extorted and under duress. So I had to agree....

So I agreed that she could come to my contract negotiations.

Kirmelewicz testified that the meeting continued while Gorski was at Town Hall, and that the meeting was concluded and the Selectmen voted to go out of executive session after their conversation.

Both Darke and Greaney testified, however, that they discussed doing the Chief's performance evaluation and then scheduled a meeting with the chief to go to the police department. At that point, Darke believed the meeting was over because "they were done talking about the chief's contract." Greaney said they "had finished the negotiation." In his Statement, Greaney wrote, "My understanding at that point is we ended our contract talks." Ex. 10.

Both Darke and Greaney stated that the next events – a conversation with Kirmelewicz, Darke's call to Gorski, and Gorski's arrival at Town Hall – occurred after they were done with their meeting. Greaney testified that Darke started talking back and forth with the chief after they were done with their formal session. Darke testified that it was customary after a Selectmen's meeting to hang out and chat.

According to Greaney, Darke said he wished that the Chief and the Gorskis would get together and fix the long-term relationships that they had. Darke testified that he said he was sure the Gorskis would probably like to put this – everybody being mad at each other – behind them. He suggested that they all get together, and that he was willing to mediate.

Darke testified that he did not tell the Chief at any point that evening that he was not going to get his contract until the situation with Gorski was resolved. Darke wrote in his Statement that Kirmelewicz "knew, as we all did, that this was not part of his contract negotiations, and had nothing to do with bringing back Officer Gorski. The sole intention was to try to patch up a relationship." Ex. 8, Ex. 1L – first attached statement. He wrote, "When Selectwoman Gorski met with us on March 14<sup>th</sup>, it was not regarding town business. It was to heal relationships." Ex. 8. He stated that they "were not

participating in any kind of formal meeting of the board of selectmen when Mrs. Gorski was present."

Both Darke and Greaney testified that Kirmelewicz said, "I'd give Eric a hug right now." They both testified that Kirmelewicz said he didn't have a problem getting together with the Gorskis or with Darke calling them right now to come over. According to Darke and Greaney, Kirmelewicz did not indicate or demonstrate in any way that he felt threatened or coerced to have Gorski join them.

Like Kirmelewicz, Darke and Greaney testified that when they asked Kirmelewicz if there would be any ethics complaints if Gorski joined them, Kirmelewicz said there would not be. All testimony indicates that Kirmelewicz did not tell the others, including Gorski, that he felt "extorted and under duress" or coerced or intimidated.

#### ***Conversation between Gorski and Kirmelewicz***

Gorski testified that Darke called her at home on March 14, 2012 and said they just concluded their meeting and "we're trying to mend fences and relationships." Darke asked her and Eric to come to Town Hall. When she arrived there, Darke said that "he wishes... that Bob and Betty and Eric and everyone could get together and, you know, resolve their differences and get back to being the same people that they were before."

The original minutes of the meeting state:

... Darke told Selectman Gorski that he wants to find a way to work things out and asked if she would talk with Kirmelewicz and whether she thought Eric would meet with the Chief and Darke to try to talk things out. Selectman Gorski said she didn't know if Eric would be willing to sit and talk with them; that Darke would have to call him and ask. She expressed several of her feelings to Kirmelewicz about decisions he has made and Kirmelewicz in turn told her his concerns about her son that had caused him and others to be worried about him; that they had only wanted to get him help and thought he would be back to work by now; that he never thought this would go on for so long.

Darke told Kirmelewicz that he does not feel this situation is a fireable offense; that it's a decision he made as Chief and he understands that; that he will call Eric Gorski the next day and try to arrange a meeting at the Police Station on Friday afternoon at 4:00pm, if Eric is willing to meet;

and that he will let Kirmelewicz know if the meeting will take place. Ex. 1L.

Kirmelewicz described the conversation with Gorski as follows:

Again, we started talking about her son. I had said to her, "Why are you trying to take my job away?" And she said, "I supported you to get this job." And I said I appreciate – "I appreciated your support at the time." I said, "But what you're doing now is wrong." And she said, "You're trying to ruin my son's reputation and livelihood." And I said, "All I've tried to do is the right thing here, and I'm being persecuted for it."

Gorski similarly testified: "He said why are you trying to take my job away from me.... I said I'm not, Bob. I said why are you trying to ruin Eric's career, reputation and name."

The only other testimony that any witness gave about the meeting was as follows. Kirmelewicz testified, that "at one point Selectman Darke suggested that himself, me and Officer Gorski get together and have a meeting and discuss things." Gorski testified, "Not much happened after that. Kind of came to a conclusion."

Darke testified that the discussion between Gorski and Kirmelewicz "was like any other meeting if you'd been fighting with someone and say, well, why did you do that, why are you doing this, why did you do that." Darke wrote, "...we were just talking as people who have known each other for some time. We were not conducting any town business." Ex 8.

Both Darke and Greaney testified that there was no discussion of the chief's contract. At the hearing, Kirmelewicz did not recall whether they discussed his employment contract, or exactly what was said about his contract. He confirmed, however, that in a police report, which is not in evidence, he wrote that after Gorski arrived on March 14, 2012, they did not negotiate his employment contract.

#### **Kirmelewicz's actions after the March 14 meeting**

Kirmelewicz testified that prior to the March 14, 2012 meeting, he filed a report about Selectwoman Gorski's conduct, and after that date, in "several correspondence," he made reports about her conduct.<sup>3</sup>

#### **Meetings on March 30 and in late April**

Subsequent to the March 14, 2012 meeting, Selectman Darke called Kirmelewicz and stated that Officer Gorski did not sound receptive to having any type of meeting. A couple of weeks later, there was a posted meeting where Kirmelewicz showed Selectmen Darke and Greaney and Administrative Assistant Lewandowski around the police station.

Selectmen Darke and Greaney held a meeting in executive session on April 26 or 27, 2012. At that meeting, Kirmelewicz signed a new three-year contract.

#### **Aftermath of contract renewal meetings**

In June or July, 2012, Darke and Greaney each received letters informing them about complaints filed against them at the Ethics Commission relating to the Selectmen's handling of Officer Gorski and the March 14, 2012 meeting. There is no evidence about when the complaints were filed with the Commission or who filed them.<sup>4</sup> After giving sworn interviews, Darke and Greaney submitted their Statements to the Commission.

Darke wrote in his Statement that, after signing Kirmelewicz's contract, he still wanted to have a management review performed. The Selectmen posted a meeting for the end of June, and he wanted to vote to get the review started. According to Darke, the Chief again stated that "he had nothing to hide but did not want the review." Darke wrote, "He badgered me and ultimately said 'maybe the Board of Selectmen should be investigated,' and that 'maybe AG Martha Coakley would like to know what is going on.'" The next week, the Selectmen received a letter that he had cc'd to the Attorney General and the Ethics Commission. Darke wrote, "Again, in my almost 18 years on the BOS, I have never seen anything like this." Ex. 8.

Darke complained in his Statement, "I have been continually pressured, bullied and threatened by the Chief." He summarized his frustration with the events regarding the renewal of Chief Kirmelewicz's contract: "The end result is that Chief Kirmelewicz got everything he wanted. He got a new three-year contract... There has not been a performance review of the chief done. And, finally, as a result of the situation, I've decided not to run again when my term is up. Even though I still care, it is not worth it." Ex. 8.

With regard to the Chief's contract negotiations, Greaney likewise wrote: "If anyone was threatened during the contract talks it was me." Ex. 10. In his

Statement, he apologized to everyone involved about “this Peyton Place drama.” He wrote, “I find it all appalling! I don’t understand why anyone would ever want to serve anyone at any level of the local politics level. I wish I never got involved with serving my Town. I will only finish my term as a Selectman at this point. I most likely will never do anything for my Town after that.....” Ex. 10.

## **I. SECTION 23(b)(2) CLAIMS**

To prove that Gorski violated § 23(b)(2)(ii), Petitioner must prove by a preponderance of the evidence that Gorski (a) knowingly or with reason to know (b) used or attempted to use her official position (c) to secure for herself or others (d) unwarranted privileges or exemptions (e) which are of substantial value, i.e., worth \$50 or more and (f) are not properly available to similarly situated individuals.

### **A. GORSKI’S CONVERSATIONS WITH GILLEN AND MORTON**

We first address the allegations that Gorski violated § 23(b)(2)(ii) by communicating directly with Deputy Chief Gillen and Detective James Morton to advocate for her son’s return to active duty.

The Commission has found that public employees used or attempted to use their positions in violation of § 23(b)(2) where they threatened to exercise authority to a person’s disadvantage or they were in a position of authority in relation to a person who could deliver a privilege and they put pressure on the person.<sup>5</sup> Having reviewed the evidence, we conclude that Gorski improperly used or attempted to use her official position on January 26, 2012 at Coach’s Restaurant when she spoke with Deputy Chief Gillen about her son’s leave, mentioned that “your appointments and contracts are coming up,” and stated that she was going to invoke the rule of necessity in order to address the contracts.

Gillen’s testimony that Gorski made these statements was corroborated by Cudmore, who had no stake in the matter and seemed credible. Cudmore reported that he even had a discussion with Gorski about how the rule of necessity works.

Where action on a matter is legally required, the rule of necessity is a procedure characterized as a “tool of last resort” by which an elected board member who otherwise is disqualified from participating in a matter may participate in order to enable a board to reach a quorum. *EC-COI-99-4*. Gorski’s reference

to the rule of necessity indicated that she understood that she was prohibited from participating in discussions of the Deputy Chief’s and Chief’s contracts, but would take such action anyway. Where Gorski previously consistently had recused herself with regard to police matters, her announcement that she would change this pattern in order to decide about the Deputy Chief’s contract and Chief’s contract amounted to a threat.

The evidence shows that Gorski made the statements at Coach’s Restaurant knowingly or with reason to know. Gillen’s account of the conversation indicates that Gorski understood at the time that Gillen would report her statements to the Chief, providing an occasion for increased consciousness about what she would say.

We also find that Gorski made the comments to secure her son’s return to active duty. As Gillen reported them, Gorski’s comments included criticism of the Chief’s actions with regard not only to her son’s leave but also other matters, but we are not persuaded that this was the moment when she realized that a totality of circumstances required her to get involved again in general oversight of the Chief’s performance. Rather, the timing of the conversation, the fact that the initial topic was her son’s leave, and her reference not only to the Chief’s contract but also Gillen’s contract convince us that the purpose of the comments was to urge Gillen to take action to aid her son.

As the Statement by Darke indicates, procedures were followed when an officer was placed on administrative leave, and whether a leave would end would be determined based on the circumstances of the case. The Commission has previously concluded that an “unwarranted privilege” is one that is “[l]acking adequate or official support” or “having no justification; groundless.” *See EC-COI-98-2*. For Gorski to secure her son’s return to active duty just because she, a Selectman, asked for it would give her son an unwarranted privilege not properly available to similarly situated individuals. The privilege was of substantial value because, if returned to active duty, her son would once again earn compensation and accrue benefits rather than using up sick time that he already had accrued. Accordingly, we find that Gorski violated §23(b)(2)(ii) by threatening her subordinate with action on his contract in an attempt to influence him to secure a return to active duty for her son.

We decline to find that Gorski violated § 23(b)(2)(ii) in the other instances in which, according to Gillen,

Gorski mentioned the employment contracts for the Deputy Chief and Chief, because of lack of corroboration or other reasons. Gillen testified that she mentioned the contracts on December 3, 2011, but Gorski denied it. If the Commission finds that two witnesses providing contradictory testimony as to a required element of the violation are both credible, Petitioner does not meet the preponderance of evidence standard. "The Petitioner cannot prevail 'if the question is left to guess, surmise, conjecture or speculation, so that the facts established are equally consistent [with no violation as with a violation].'" *In Re Kinsella*, 1996 SEC 833, 835, quoting *Tartas' Case*, 328 Mass. 585, 587 (1952).

This principle also guides us with respect to Gorski's statements to Gillen outside the Selectmen's meeting on February 27, 2012 that "It's too bad" and "It's sad." Gillen regarded these statements and the "smirk" that accompanied them as threats about his contract because they came right before his contract negotiations with the other Selectmen. Gorski explained that her statements were a comment about damaged friendships. Objectively, the wording of the statements themselves is more a commentary than a threat, and what "it's" refers to is unclear, so it would require a leap to conclude that the reference was to the contracts or any action by her with regard to them. In addition, by February 27, 2012, Gorski had received advice from the Ethics Commission and again decided not to attend BOS meetings about the Deputy Chief and Chief's employment contracts. Gillen acknowledged that he was trying to avoid an encounter with Gorski when she left the Selectmen's meeting because he knew she would not sit in on their negotiations. When assessing the two witnesses' credibility, it is at least equally persuasive that Gillen overreacted in perceiving Gorski's statements as a threat.

Finally, Petitioner has not proven by a preponderance of the evidence that Gorski violated § 23(b)(2) by asking Detective James Morton whether the union was doing everything it could to help her son. First, the evidence suggests that Gorski was communicating with him in his role as a union representative rather than trying to influence a police officer to reverse her son's administrative leave. Second, nothing in her question to Morton suggested that it was a threat, or that any consequence would follow for Morton for failure to respond to it, or that she otherwise invoked her authority as a Selectman. Finally, Morton contemporaneously reported to the Chief and also testified at the hearing that Gorski did not discuss her son's situation with him and that he did not feel intimidated during their conversation.

These statements are consistent with Gorski's statements that she was not trying to influence Morton.

#### **B. GORSKI'S CONVERSATIONS WITH SELECTMEN DARKE AND GREANEY AND CHIEF KIRMELEWICZ**

Petitioner alleged that Gorski violated § 23(b)(2)(ii) by telling Selectmen Darke and Greaney that she was upset about her son's situation and by discussing her son's situation at a March 14, 2012 BOS executive session concerning the Chief's employment contract negotiations. A thread in the testimony by Chief Kirmelewicz and Deputy Chief Gillen was that Gorski had misused her position either by pressuring Chief Kirmelewicz to improve her son's employment situation or by influencing her fellow Selectmen to change her son's employment status or pressure the Chief to do so.

As explained, below, however, the evidence does not support a finding that Gorski violated § 23(b)(2)(ii) in her conversations either with her fellow Selectmen or with Kirmelewicz.

#### **Evidence with regard to Gorski's influence on the Selectmen**

The conversation on March 14, 2012 in which Gorski spoke directly with Chief Kirmelewicz and Selectmen Darke and Greaney will be addressed below. Putting that conversation aside, there was no evidence that Gorski had any direct communications with Kirmelewicz about her son's employment situation from November 7, 2011, when he put her son on administrative leave, until July 13, 2012, when her son was returned to active duty.

The only testimony by Gorski, Darke or Greaney about direct communications between Gorski and the other two Selectmen about her son's leave was that she told Darke and Greaney, each maybe twice, that she was upset about Eric's situation. We do not conclude that these statements, without more, prove a § 23(b)(2) violation. In these statements, Gorski expressed her own emotional state, but made no attempt directly or indirectly to secure a change in her son's employment status.

Gorski testified that she never tried to influence the other Selectmen in their actions dealing with Eric's administrative leave. Darke also testified that Gorski did not influence him or attempt to influence him in any way whatsoever in connection with her son Eric's situation.

Again momentarily putting aside the March 14, 2012 conversation, there is also no evidence that Gorski had any communications directly with the Chief about his employment contract from November 7, 2011 through late April, 2012 when the other two Selectmen renewed it.

Prior to January 30, 2012, Gorski consistently had recused herself as a Selectman from matters regarding the Police Department. On January 30, 2012, during executive session of a BOS meeting, Gorski informed Selectmen Darke and Greaney that she wanted to participate in the negotiations of the contracts for the Chief and Deputy Chief. What happened next, however, demonstrated that she did not hold sway over her fellow Selectmen with regard to these issues. Rather than accepting that she would participate, the Selectmen postponed the negotiations so that Gorski could get an opinion from the Ethics Commission.

After receiving advice from the Ethics Commission, Gorski attended no BOS meetings with regard to the negotiations of the two employment contracts. Gorski, Darke and Greaney did not testify about any communication by Gorski with either Darke or Greaney about either contract after January 30, 2012. Gorski testified that she never tried to influence Selectmen Darke and Greaney in their actions involving negotiations of the contracts with the Chief or Deputy Chief.

Before Kirmelewicz attended his contract negotiation with Selectmen Darke and Greaney on February 27, 2012, he received a text from Gillen, who just previously had the conversation with Gorski in which she said, "It's too bad" and "It's sad." Nothing in those statements, however, suggested that Gorski had taken action unfavorable to the Deputy Chief or Chief's contract negotiations or was pressuring the other Selectmen to act unfavorably with regard to either contract.

Next, there was conflicting evidence about whether Gorski pressured the other Selectmen or tried to influence them during Kirmelewicz's contract negotiations. At the two meetings with Gillen and Kirmelewicz on February 27, 2012, Selectman Darke suggested a management review of the Police Department. About each of their meetings, Kirmelewicz and Gillen testified, in lockstep, that Darke stated that they were getting a "lot of pressure" from Gorski.

Darke, however, testified that at the February 27 meeting he did not tell either the Chief or the Deputy

Chief that Gorski had pressured him. He testified that Gorski did not contact him in any way whatsoever regarding either the Chief's contract or the Deputy Chief's contract, and that he did not have any conversations with Gorski about the renewal of either contract. In his Statement, he also wrote that he "was never pressured by Selectwoman Gorski to behave in any manner toward the Chief." Ex. 8.

With regard to the February 27, 2012 meetings, Darke testified that he had a number of concerns about how Kirmelewicz treated personnel, including Officer Gorski. His Statement also outlines these concerns, as previously noted. Darke's insistence that the management review was his own idea contradicts the suggestion that Gorski had imposed the idea upon him.

On March 5, 2012, Selectmen Darke and Greaney met again with Kirmelewicz. Kirmelewicz testified that, at that meeting as well, he was told, "We're getting a lot of pressure from Selectwoman Gorski." According to Darke, however, it was Kirmelewicz who accused the Selectmen of being influenced by Gorski. Darke denied that he was "influenced by anybody."

The clear contradiction between Kirmelewicz's testimony and Darke's testimony about whether Darke stated that Gorski was pressuring the Selectmen requires the Commission to assess the witnesses' credibility. Relying on the principle stated in *Kinsella*, it would be sufficient to conclude that Kirmelewicz's testimony was not more credible than Darke's to find that Petitioner fails to meet the burden of proof. In actuality, however, Kirmelewicz's testimony was less credible than Darke's.

When Darke proposed the management review, Kirmelewicz repeatedly responded that the Selectmen should approve his contract first. Insisting on having a contract renewed before a performance evaluation is done turns usual employment practice on its head. Kirmelewicz's entire course of conduct suggested that he regarded himself as a victim and consistently took self-protective action to make certain that the Selectmen would not evaluate his actual performance as police chief before renewing his contract. This included bringing or attempting to bring to bear the authority of various state agencies. Kirmelewicz took this action during a period of time when Gorski was not attending Selectmen's meetings and had not even spoken with him directly since the previous November.

The Selectmen met with Kirmelewicz on February 6, 2012, and Gorski did not attend. Subsequently, on February 9, 2012, Kirmelewicz met with District Attorney Blodgett in hopes that Blodgett would bring a criminal claim against Gorski, but Blodgett declined to file an action. The Selectmen met on February 27 and again on March 5, 2012, and Gorski did not attend. On March 7, 2012, Kirmelewicz filed a complaint with the State Ethics Commission against Gorski. In the letter, he talks about “malicious manipulation” by Gorski and “a reign of terror” at the Police Department as a result of Gorski’s efforts. He wrote that both of the other selectmen are intimidated by Gorski. Greaney testified, and his notes confirm, that on March 8, Kirmelewicz threatened Greaney that he would file a second complaint, this time against the entire board, if his contract was not renewed at the next meeting. According to Darke, in June, 2012, even after Kirmelewicz had gotten his new contract, he still resisted a management study of the police department and, to fend it off, sent a letter about the Selectmen to the Attorney General and the Ethics Commission.<sup>6</sup>

In a comparison of the testimony, Darke’s explanation that the management review was his own idea was supported by examples and was persuasive. There was no testimony by Darke or Greaney that Gorski had orchestrated the management review from behind the scenes, or that she otherwise exerted any influence with regard to the Chief’s contract. Rather, both Darke and Greaney wrote in their Statements that they were “threatened” or “bullied” by the Chief. Ex. 8, 10. In their Statements and the testimony about them, both Darke and Greaney made compelling comments that the sequence of events had lead them to decide not to continue to serve as Selectmen after their terms ended. Ex. 8, 10. On the whole, their testimony with regard to the contract negotiations was more credible than the Chief’s.

### **The March 14, 2012 discussion**

Finally, Petitioner contends that Gorski misused her position as a Selectman by “participating extensively in the March 14, 2012 BOS executive session meeting concerning the Chief’s job contract negotiations.” OTSC, par. 22. The weight of the evidence, however, is that the meeting was over by the time Gorski arrived and that the Chief’s contract was not the subject of discussion.

The evidence shows that Selectmen Darke and Greaney met with Kirmelewicz about his contract, but Gorski initially did not attend. Subsequently, Darke proposed to Kirmelewicz to have Gorski come

to Town Hall. There was differing evidence as to whether the discussion that subsequently took place between Gorski and Kirmelewicz was part of the Selectmen’s meeting or happened after the meeting had ended.

The original Executive Session Minutes indicate that the meeting included the discussion between Gorski and Kirmelewicz. Kirmelewicz also described a continuous formal meeting. He testified that Darke tied his reappointment to a resolution of Officer Gorski’s situation and then invited Gorski to his contract negotiation meeting, having extracted a promise not to report Darke and Greaney to the Ethics Commission.

Darke and Greaney, however, testified that the evening proceeded in two parts. Initially, according to Darke, they again talked about a performance evaluation, and then they scheduled a time to meet with the Chief at the police station. Both Darke and Greaney consistently stated that the meeting with regard to Kirmelewicz’s contract negotiations ended at that point. They both testified that it was after this point that Darke raised the possibility with Kirmelewicz of meeting with Gorski. Each of them added revisions to the minutes indicating that the conversation between Kirmelewicz and Gorski was not part of the contract negotiations.

Although it is a close call, and we are reluctant to distrust information contained in minutes kept contemporaneously with a meeting, Darke and Greaney’s consistent first-hand accounts convince us that, as Gorski contends, the discussion between Gorski and Kirmelewicz did not take place during the course of a Selectman’s meeting, and rather was an informal discussion that happened after the meeting ended.

In addition, apart from their opening salvos -- “Why are you trying to take my job away?” and “Why are you trying to ruin Eric’s career, reputation and name?” -- there was no other evidence that their discussion was about Kirmelewicz’s employment contract, or that Gorski used the opportunity to impose upon Kirmelewicz to change her son’s employment status. Darke and Greaney’s testimony was consistent that the Chief’s contract was not the subject of the conversation, and even Kirmelewicz previously had acknowledged that Gorski did not negotiate his contract on March 14, 2012. The only comment about a next step regarding Eric Gorski was Darke’s suggestion to have another meeting. There was no testimony that Gorski made any substantive comment regarding her son. This record provides no

basis for finding that Gorski misused her position either to coerce Kirmelewicz to engage in the discussion or to pressure him in order to secure an unwarranted privilege for her son.

In *In re Piatelli*, 2010 SEC 2296,<sup>7</sup> the Commission found that a Trustee of Quincy College violated § 23(b)(2) when she contacted the President of the College, who was the appointing authority for positions at the College, and asked him if it would be a problem if her brother applied for an entry level position. Although she claimed that she did not want to be perceived as someone who forced the President to hire people, she also told the President about her brother's educational achievements and goals and stated that her brother would be "a good fit for the position." *Id.* at 2300. The Commission concluded that Piatelli, through this communication, improperly pressured her subordinate to secure a privilege of substantial value for her family member. *Id.* at 2302.

By contrast, Gorski did not seek out the opportunity to speak with the Chief. She responded to an invitation from a fellow Selectman to speak with Kirmelewicz. Darke, Greaney and Kirmelewicz all testified that Kirmelewicz agreed to inviting Gorski, and that he did not express any objection. Second, based on Darke's invitation, the expectation was that the conversation would not be about police department business, but about healing relationships. Even Kirmelewicz acknowledged that Darke "just wanted everyone to get along." The actual content of the discussion demonstrates that Gorski did not request a change in her son's status or leverage any authority regarding his employment. We conclude that Petitioner has not met the burden of proving by a preponderance of the evidence that Gorski violated § 23(b)(2)(ii) either through her communications with her fellow Selectmen or her discussion with Kirmelewicz on March 14, 2012.

## II. SECTION 17 CLAIMS

To prove a violation of G.L. c. 17(c), Petitioner must show that Gorski was a municipal employee and that in relation to a matter in which the Town of Groveland was a party or had a direct and substantial interest, she acted as agent for someone other than the Town. To prove a § 17(c) violation, Petitioner must prove that Gorski "acted for" her son as his "agent."

As a matter of precedent, the State Ethics Commission "is not restricted to the common law definition of agency..." *In Re Robert Sullivan*, 1987 SEC 312, 314-315.

The Commission interprets "agent" as follows:

Within the meaning of the conflict of interest law, a municipal employee acts as an agent where he acts on behalf of some other person or entity. *In Re Zora*, 1989 SEC 401, 407; *aff'd.* No. 89-0937B (Mass. Super. Ct., Plymouth, January 2, 1991). The mere speaking or writing on behalf of another party satisfies the agency element of s. 17. *Id.*; *EC-COI-84-6*.

*In Re Dias*, 1992 SEC 574, 575. A footnote in *Dias* says: "If the conduct of the parties is such that an inference is warranted that one is acting on behalf of and with the consent of another, an agency exists as a matter of law. *Choate v. Board of Assessors of Boston*, 304 Mass. 298, 300 (1939); *In Re Sullivan*, 1987 SEC 312, 314." *Dias*, 1992 SEC at 575 n. 1.

The only evidence about communications between Gorski and her son is in an answer to interrogatories. There, Gorski says that she had several conversations with Eric Gorski regarding his being on administrative leave from the GPD, but that she does not recall the dates or nature of those conversations. Ex. 7, Interrogatory No. 7.

Gorski's testimony indicates the opposite of agency. By her own account, Gorski stated to Gillen on December 3, 2011 that "Eric's not telling me anything" and on February 27, 2012 that "Eric tells me nothing." Similarly, during the discussion at Town Hall on March 14, 2012, when Darke asked Gorski if Eric would be willing to meet with the Chief and the Selectmen, she replied that she "didn't know if Eric would be willing to sit and talk with them; that Darke would have to call him and ask." Ex. 1L. There was no evidence that Gorski acted with her son's knowledge or at his request rather than on her own initiative when she spoke about him to Gillen or Morton, to her fellow Selectmen, or to Kirmelewicz. In addition, the evidence does not include any request by Gorski to any police officer or Selectman about what specifically should be done for her son. On these facts, we find no violation of § 17.

## III. SECTION 19 CLAIMS

To prove that Gorski violated § 19 as alleged, Petitioner had the burden of proving that she participated as a Selectman in a particular matter in which her son, an immediate family member, had a financial interest. With the exception of the January 30, 2012 meeting at which she only announced an intent to participate in the negotiation of the Chief

and Deputy Chief's employment contracts, Gorski recused herself as a Selectman from every BOS meeting regarding either their contracts or her son's employment situation. In light of our conclusion that her conversation with Kirmelewicz, Darke and Greaney on March 14, 2012 was an informal conversation that took place after the end of the Selectman's meeting about the Chief's contract, we conclude that Gorski did not participate "as a Selectman" in that meeting.

#### IV. SECTION 23(b)(3) CLAIMS

To prove that Gorski violated § 23(b)(3), Petitioner was required to prove that a reasonable person would conclude that someone could unduly enjoy her favor or improperly influence her in the performance of her official duties, or that she was likely to act or fail to act as a result of kinship, rank, position or undue influence, and that, without filing a proper § 23(b)(3) disclosure, she nonetheless performed her official duties. Petitioner alleged that Gorski violated § 23(b)(3) "[b]y acting officially as a BOS member in (1) the ongoing controversy as to whether her son should return to active duty as a GPD police officer and (2) in the contract negotiations regarding the police chief while her son had a pending personnel action before the chief."

Although we have found that Gorski improperly misused her position when she berated Gillen at Coach's Restaurant, we do not find that she performed official duties when she engaged in this conduct. She also did not perform official duties as a Selectman when she approached Eric's union representative to ask if assistance was being provided to him. Finally, the evidence also does not show that Gorski performed any official duties with regard to the Chief's contract, either when she spoke with Kirmelewicz on March 14, 2012 or at any other time. Accordingly, we find that Gorski did not violate § 23(b)(3) by engaging in these conversations without having previously filed a § 23(b)(3) disclosure.

#### CONCLUSION

Petitioner has proved by a preponderance of the evidence that, in violation of § 23(b)(2)(ii), Gorski improperly used her position as a Selectman on January 26, 2012 when she made threats to her subordinate, Deputy Chief Jeffrey Gillen, about the renewal of the employment contracts for Gillen and Chief Robert Kirmelewicz in order to influence him to help return her son to active police duty. For this

violation, Gorski is **ORDERED** to pay a civil penalty of \$2,500.

All other claims under § 23(b)(2)(ii), § 17, § 19 and § 23(b)(3) are dismissed with prejudice.

**DATE AUTHORIZED:** November 20, 2014

**DATE ISSUED:** December 11, 2014

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<sup>1</sup> Commissioner Murphy abstained from participating in this matter. Commissioner Mangum participated in the deliberations, but is not a signatory to this Decision and Order because her term ended before it was issued. Commissioner Mills did not participate in the deliberations.

<sup>2</sup> There is differing evidence about whether the meeting was an executive session. The minutes indicate that executive session began at 6:16. A vote by Darke and Greaney, but not Gorski, to close the executive session was recorded at 8:45. The meeting then was adjourned at 8:46 p.m. Kirmelewicz testified that the Executive Session placard was posted, the door was locked, and the Selectmen voted to go out of executive session. On the other hand, after complaints were filed against Darke and Greaney at the Ethics Commission in June or July, 2012, Darke and Greaney each revisited the March 14, 2012 minutes and filed written statements revising them on February 11, 2013. Darke's attached statement says that they did not lock the door and did not post the Executive Session sign, and did not officially go into Executive session. "We all just started talking." Ex. 1L – first attached statement. Greaney's attached statement says, "I still stand by the feeling we never went into executive session this particular evening.... Although it should have been in executive due to the process at hand." Ex. 1L– second attached statement. Gorski testified that they did not have to unlock or open up to let her in. She testified that they were not in executive session when she arrived at the meeting and did not go back into executive session when she was there.

<sup>3</sup> In an affidavit dated February 14, 2014, Kirmelewicz waived confidentiality with regard to having filed a complaint with the Ethics Commission against Gorski on March 22, 2012 "asserting that Gorski intervened to get her son re-appointed to the police force and attempted to retaliate against me and the deputy chief by holding up our contract renewals as chief and deputy chief, respectively." Ex. F for identification. This affidavit was marked for identification, but not introduced as an exhibit, so we do not rely upon it as evidence.

<sup>4</sup> Kirmelewicz was asked whether he ever told his deputy Chief that he had filed a complaint against Darke. He replied, “At some point I’m sure we discussed that.”

<sup>5</sup> See, e.g., *In Re Haluch*, 2004 SEC 1165 (Chairman of the Public Works Commission violated § 23(b)(2) when, in personal negotiations regarding a payment he would receive from a company that needed permits from the Commission to build a pipeline, he stated that he wielded a lot of power and influence in the town and threatened that the pipeline’s bonds would not be released and that he could shut down the pipeline); *In Re Travis*, 2001 SEC 1014 (state representative who was chairman of the Joint Committee on Banks and Banking violated § 23(b)(2) where he solicited a donation from a bank that had an interest in legislative matters before the banking committee and left phone messages saying “If we can’t deal with this issue, I’m sure we’ll have problems with others” and “I certainly will remember this particular incident.”); *In Re DeWald*, 2006 SEC 2051 (Finance Committee chair, who had authority in his official position to review and approve money to pay legal bills for special counsel beyond those that were budgeted, violated § 23(b)(2) when, at the request of a friend who was representing the opposing party, he called special counsel, introduced himself as the Finance Committee chair and tried to persuade her to settle the case); *In Re Singleton*, 1990 SEC 476 (Fire Chief violated § 23(b)(2) where, at a time when a company was evaluating whether to use his son’s company as a drywall subcontractor for a project, he asked the company’s foreman whether he had decided who would get the drywall work and told the foreman “it could take forever” to obtain an inspection from the Fire Department). See also *EC-COI-87-31* (Chair of the Board of Health was advised that he could not put implicit or explicit pressure on the Health Agent or other Board members to treat his own restaurant differently from other food establishments with respect to licenses, permits, inspections and the like).

<sup>6</sup> While Chief Kirmelewicz is not the subject of this adjudicatory hearing, based on the testimony and Statements by Darke and Greaney and the notes Greaney wrote about Kirmelewicz’s call to him on March 8, 2014, we conclude that the Chief improperly engaged in threatening and intimidating conduct, including threatening these selectmen with complaints to the Ethics Commission in order to discourage them from assessing his job performance. The purpose of a confidential complaint to the Ethics Commission is to alert our civil enforcement agency to instances in which governmental employees put

their own personal, family and business interests ahead of the public interest. We cannot condone the Chief’s aggressive, self-serving threat or use of this process in order to prevent governmental employees from properly performing public duties that could have proven disadvantageous to him.

<sup>7</sup> *In Re Piatelli*, 2010 SEC 2296, motion for judgment on the pleadings denied sub nom. *Piatelli v. State Ethics Commission*, Superior Ct. Civ. Action No. 2010-02123-B (Oct. 19, 2011) (Giles, J.), aff’d, 84 Mass. App. Ct. 1107, 991 N.Ed.2d 665 (2013), appeal denied, 466 Mass. 1108, 996 N.E.2d 474 (2013).

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION  
ADJUDICATORY  
DOCKET NO. 13-0010**

**IN THE MATTER OF  
STEPHEN HYDE, SR.**

Appearances: Candies Pruitt-Doncaster, Esq.  
Counsel for Petitioner

Geoffrey R. Farrington, Esq.  
Counsel for Respondent

Commissioners: Barbara A. Dortch-Okara, Ch.,  
Martin F. Murphy, William J. Trach, and Regina L.  
Quinlan<sup>1</sup>

Presiding Officer: Commissioner William J. Trach

**DECISION AND ORDER**

**I. Introduction**

This matter concerns Respondent Stephen Hyde, Sr.’s alleged use of his position as Chief of the Town of Southampton Fire Department (“SFD”) to secure for himself and his son unwarranted payments and benefits of substantial value, and Hyde’s alleged presentation to the Town of Southampton (“Town”) of false or fraudulent claims for payment. Specifically, the Commission’s Enforcement Division (“Petitioner”) alleges that Hyde, knowingly or with reason to know: (A) used his official position: (1) to secure for his son payments by the Town totaling approximately \$6,646 for work his son did not perform, and (2) to secure for himself use of a

Town-owned generator for about two years, in violation of G. L. c. 268A, § 23(b)(2)(ii);<sup>2</sup> and (B) presented false payrolls to the Town in order to cause the \$6,646 in payments to his son in violation of G. L. c. 268A, § 23(b)(4).<sup>3</sup> In his defense, Hyde asserts that the payments to his son were for mechanical, electrical and body work (hereinafter “repair and maintenance work”) that his son performed for the SFD; and that his use of the generator at his home was within his authority as Fire Chief under the so-called “Strong Chief Law,” G. L. c. 48, § 42, and for the public’s safety, and that any personal benefit from the use was *de minimis*. Hyde denies violating G. L. c. 268A, §§ 23(b)(2)(ii) and 23(b)(4).

## **II. Procedural Background**

This matter commenced on October 28, 2013, with Petitioner’s issuance of an Order to Show Cause alleging that Hyde violated G. L. c. 268A, §§ 23(b)(2)(ii) and 23(b)(4) in 2011 while serving as SFD Fire Chief. Hyde answered on November 15, 2013, denying most of the allegations and asserting seven affirmative defenses. An adjudicatory hearing was held on June 23, 2014, at which ten exhibits were admitted into evidence, five witnesses, including Hyde and his son, testified and the Parties made their closing arguments before the Presiding Officer. Respondent moved to dismiss at the end of Petitioner’s case and again at the close of all evidence. Both motions were denied by the Presiding Officer. The parties submitted their final briefs on August 27, 2014.

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

## **III. Findings of Fact**

1. At the times here relevant, Hyde was the SFD Fire Chief and a full-time Town employee. Hyde served as Fire Chief from 2005 through June 2012 and served on the SFD in other capacities from 1979 to 2005.

2. Hyde’s duties as Fire Chief included answering fire and rescue calls, hiring and firing SFD personnel, completing and presenting the SFD payroll to the Town for payment and other duties. As Fire Chief, Hyde had an employment contract with the Southampton Board of Selectmen.

## ***The Payments to Hyde’s Son***

3. As Fire Chief, Hyde was the SFD’s only salaried employee. All other SFD employees were hourly employees who served in response to fire and ambulance calls or when they were assigned daytime station coverage duty. During the relevant period, Hyde assigned one SFD employee each day to work daytime station coverage duty.

4. SFD employees were required by Hyde to fill out forms called “call sheets” in order to record and get credit for the time they worked either responding to fire and ambulance calls or performing daytime station coverage duties. If a firefighter forgot to fill out a call sheet, Hyde would call and ask the firefighter to return to the station and fill out the call sheet. For fire or ambulance calls, a single SFD employee from among those who responded to the call would return to the SFD station and fill out a call sheet identifying each of the SFD employees who had responded to the call and the duration of the call. For daytime station coverage duties, the employee working at the station would fill out a call sheet identifying himself as working at the station and the hours that he worked and in some cases the work performed. In all cases, the completed call sheets were deposited in a locked box (the “lockbox”) at the Fire Station, to which only Hyde as Fire Chief had the key.

5. Every two weeks, Hyde would remove the call sheets from the lockbox and use them to calculate the number of hours each SFD employee had worked during the pay period and then use that number and each employee’s hourly pay rate or rates to calculate and complete the SFD payroll.<sup>4</sup>

6. In 2011, the SFD payrolls listed the names of the SFD employees to be paid, including Hyde and his son, and itemized each employee’s hours worked during the relevant pay period, rates of pay and wages earned. After July 2011, Hyde was no longer included on the payrolls.

7. Every two weeks, Hyde signed the completed SFD payroll and presented it to the Town in order that SFD employees would be paid for the work they performed during that pay period.

8. Hyde has a son, Stephen Hyde, Jr. At the times here relevant, Hyde’s son was an SFD firefighter and emergency medical technician (“EMT”).

9. From January to December 2011, Hyde's son's name was on the SFD payrolls Hyde completed and presented to the Town for payment.

10. Hyde's son was not a salaried SFD employee. In 2011, Hyde's son was compensated at set hourly pay rates for the hours he was recorded as having worked responding to fire and ambulance calls or providing daytime station coverage on the SFD call sheets.

11. From January to December 2011, Hyde checked or entered his son's name on as many as 47 call sheets for days and times when his son had not responded to ambulance or fire calls or performed daytime station coverage duties. Hyde did this either by checking his son's name off on call sheets for fire or ambulance calls he or other firefighters had completed (by placing an "x" or a checkmark next to his son's name) or by checking off his son's name on call sheets for daytime station coverage completed by other firefighters. Where Hyde had not originally completed the call sheets, he removed call sheets completed by other firefighters from the lockbox and altered them by checking off his son's name.<sup>5</sup>

12. Of the 47 call sheets in question, eleven are for fire and ambulance calls. The preponderance of the evidence supports the conclusion that Hyde checked off his son's name on at least nine of the eleven fire and ambulance call sheets crediting him with a total of at least about 13 hours of work.<sup>6</sup> Based on the dispatch sheets in evidence and the testimony of the witnesses, we conclude that Hyde's son in fact did not respond to these nine calls. The evidence is inconclusive as to the other two calls.

13. Having thus altered at least nine of the eleven fire and ambulance call sheets, Hyde included the false information in SFD payrolls he calculated and presented to the Town resulting in the Town paying his son a total of at least about \$200 for fire and ambulance call work he in fact did not perform.<sup>7</sup>

14. Of the 47 call sheets in question, 36 are for daytime station coverage and were originally completed by Firefighters Wayne Theroux and Kyle Miltimore. Hyde checked off his son's name on thirty daytime coverage station call sheets completed by Theroux and six by Miltimore, crediting his son with a total of 336 hours of daytime station coverage work. Hyde's son did not perform daytime station coverage on any of the 36 days on which Hyde checked off his name as having performed such work, and therefore did not perform the 336 hours of daytime station coverage for which he was paid.<sup>8</sup>

15. Having thus altered the 36 daytime station coverage call sheets, Hyde included the false information in SFD payrolls he calculated and presented to the Town resulting in the Town paying his son approximately \$6,172 for 336 hours of daytime station coverage that he in fact did not perform.

16. From January to December 2011, Hyde presented at least sixteen payrolls based in part on false information relating to his son to the Town for payment,<sup>9</sup> each of which included a payment to his son of \$50 or more for ambulance and fire call work or daytime station coverage duty that he did not perform.<sup>10</sup>

17. Although Hyde testified that the payments he caused to be made by the Town to his son were for repair and maintenance work his son performed on SFD vehicles and equipment, Hyde admitted that the specific payments to his son were not necessarily for work his son performed in the pay periods for which the payments were made. Hyde testified that the amounts that he paid his son and the timing of those payments were based on when Hyde thought he had sufficient funds to pay his son rather than the work that his son had actually performed in the pay period.

18. Hyde's son did some repair and maintenance work on SFD trucks. Some of this work was performed at the SFD station and was witnessed by other SFD personnel. The amount of this work cannot be reliably and accurately quantified.

19. Hyde's son testified to roughly 193 hours of repair and maintenance work he purportedly performed for the SFD in 2011. Much of his testimony consisted of rough estimates and guesses concerning the number of hours he worked. He testified that most of this work was performed in the garage at his father's home. Only one SFD employee who testified, other than Hyde, witnessed any of Hyde's son's work at Hyde's home. However, whether the work witnessed was performed in 2011 was not established. Some of the work Hyde's son claimed to have performed would have duplicated work performed by SFD employees at the Southampton Highway Department garage, for example, oil changes on SFD vehicles, and some of it would have been performed prior to 2011, for example, certain SFD vehicle body work and painting.<sup>11</sup>

20. Hyde's son's testimony concerning the work he purportedly performed for the SFD was unsupported

by any records. Neither Hyde nor his son documented any of the repair and maintenance work that Hyde's son purportedly performed for the SFD. Hyde did not record the hours his son spent doing the repair and maintenance work he claims to have performed. Thus, there is no way to reliably and accurately determine what repair and maintenance work Hyde's son actually did, when he did it and how long he spent doing it.<sup>12</sup>

21. Hyde's son should have completed a call sheet reporting any hours he spent performing repair or maintenance work for the SFD, but Hyde did not require him to do so. No call sheets were completed by Hyde's son for any of the repair and maintenance work that he purportedly performed for the SFD.

22. Based on Hyde's son's own testimony, Hyde's son was paid for at least 143 hours more of station coverage work time than the hours of repair and maintenance work he claimed to have performed in 2011. These payments totaled at least about \$2,627. This total is in addition to the approximately 13 hours of ambulance and fire call work that he did not perform for which he was paid at least about \$200.

23. Thus, even if Hyde's son were to be credited with the hours he testified he spent doing repair and maintenance work for the SFD, he was still paid in 2011 at least \$2,827 for about 156 hours of work he did not perform. For the reasons stated above, however, given that none of the work Hyde's son claims to have performed was documented, no call sheets were filled out by him for that work, and Hyde's own admission that the payments for the work purportedly performed by his son occurred in pay periods that bore no relation to the time the work was purportedly performed, there is insufficient evidence to demonstrate that Hyde's son actually performed the work he claimed to have performed.

#### ***The Generator***

24. In 2008, Hyde used SFD funds to purchase a 7-kilowatt Briggs & Stratton Home Standby Remote Start Generator ("the SFD generator") for \$2,049.98.

25. In 2009, Hyde moved the SFD generator to his residence and wired it to the basement circuit panel and connected it to his home's natural gas line. Hyde paid for the gas to power the generator. Previously, Hyde had used a gasoline-powered generator at his home which required periodic refueling.

26. Hyde did not obtain authorization from the Board of Selectmen to use the SFD generator at his home.

27. Hyde used the SFD generator to power his home's electrical system during power outages and thus to power SFD radios at his home, which he used as Fire Chief to communicate with SFD firefighters, EMTs and dispatchers.

28. Hyde returned the SFD generator to the SFD at the end of his service as Fire Chief in June 2012.

#### **IV. Decision**

The 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 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.

Petitioner alleges that Hyde violated § 23(b)(2)(ii) by using his position as SFD Fire Chief to: (a) secure for his son payments for work he did not perform; and (b) secure for himself the free use at his home of a Town-owned generator. In order to have established that Hyde violated § 23(b)(2)(ii), Petitioner must have proved, as to each alleged violation, each of the following elements by a preponderance of the evidence: that Hyde (1) was a municipal employee, (2) who knowingly, or with reason to know, used or attempted to use his official position, (3) to secure for himself or others unwarranted privileges or exemptions, (4) which were of substantial value and (5) not properly available to similarly situated individuals.

Petitioner also alleges that Hyde violated § 23(b)(4) by presenting to the Town false or fraudulent claims for payment. In order to have proved that Hyde violated § 23(b)(4), Petitioner must have proved each of the following elements by a preponderance of the evidence: that Hyde (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.

There is no dispute that Hyde was, at all relevant times, the SFD Fire Chief and a full-time employee of the Town. As such, Hyde was, at all relevant times, a municipal employee as defined in G. L. c. 268A, § 1(g). Thus, this element is established as to each of the three alleged violations.

We will first discuss the alleged § 23(b)(2)(ii) violation arising from the payments to Hyde's son. Then we will discuss Hyde's alleged violation of § 23(b)(4). Finally, we will discuss the alleged § 23(b)(2)(ii) violation arising from Hyde's use of the SFD generator.

**A. The Alleged § 23(b)(2)(ii) Violation Based on the Payments to Hyde's Son**

*Hyde Knowingly or with Reason to Know Used His Official Position to Secure Privileges for His Son.*

**Hyde Used his Official Position as SFD Fire Chief**

Hyde had access to the SFD call sheets, prepared SFD payrolls and presented them to the Town for payment, all in his capacity as SFD Fire Chief. Hyde could not have removed the call sheets from the lockbox, altered them to add his son, prepared payrolls showing payments due to his son based on or backed-up by the altered call sheets and presented the payrolls to the Town except through the use of his official position. Thus, Hyde used his official position.

**Hyde Acted Knowingly<sup>13</sup> or with Reason to Know<sup>14</sup>**

The evidence establishes that Hyde as Fire Chief intentionally added his son's name to call sheets for fire and ambulance calls and daytime station coverage when he knew his son had not responded to the calls or provided the daytime coverage the call sheets indicated. The evidence also establishes that Hyde as Fire Chief intentionally prepared and presented to the Town for payment SFD payrolls based on and/or backed-up by falsified call sheets. Hyde further sometimes deliberately included his son on SFD payrolls in order to pay him, not for work done during the relevant pay period, but instead for work his son purportedly performed at another time, sometimes weeks or months earlier. Given that Hyde acted intentionally, he also acted knowingly or with reason to know.

Hyde's defense is that he only intended to pay his son for work that his son performed and thus, implicitly, that his intent in preparing and presenting the payrolls based on and/or backed-up by the altered call sheets was to cause the Town to pay his son for the repair and maintenance work that his son performed for the SFD rather than to secure for him an unearned benefit. The preponderance of the credible evidence shows, however, that Hyde's son was paid for at least about 156 hours of work that he

did not perform. The evidence further shows that Hyde failed to document or record his son's work, failed to require his son to record his work on call sheets, and otherwise made no effort whatsoever to accurately keep track of the repairs and maintenance his son purportedly performed and the amount of time he spent performing that work so as to ensure that his son was not overpaid. Hyde's failure to keep such records was reckless and gave him reason to know that the Town's payments to his son were excessive and thus unwarranted privileges. A reasonable person of ordinary prudence and intelligence in Hyde's situation would have been able to infer that his son was being paid for hours of work he did not perform.

**Hyde Secured Privileges for his Son**

The payments the Town made to Hyde's son as a result of the payrolls based on and/or backed-up by the falsified call sheets that Hyde presented to the Town were special benefits and, thus, privileges.<sup>15</sup>

Therefore, the evidence establishes that Hyde, by intentionally causing the Town to pay his son based on false payrolls he deliberately prepared and submitted as Fire Chief, knowingly or with reason to know used his official position as Fire Chief to secure privileges for his son.

***The Privileges were Unwarranted<sup>16</sup>***

The preponderance of the credible evidence shows that the Town payments to his son which Hyde secured through the use of his official position were without legitimate reason or justification. First, the payments resulted from Hyde's presentation of SFD payrolls to the Town for payment which falsely represented that his son had worked a certain number of hours during the relevant pay period. Second, because Hyde did not maintain any records of the work his son had purportedly performed, the payments to his son were based on Hyde's uncertain knowledge and memory of that work. Given that the payments were based on both deliberately false and recklessly uncertain information about Hyde's son's work for the SFD, the payments were without legitimate reason or justification and thus were unwarranted privileges. Finally, where the preponderance of the evidence shows that Hyde's son was paid in 2011 for at least about 156 more hours of work than he actually performed, those excess payments were unwarranted privileges.

***The Unwarranted Privileges were of Substantial Value***

Each Town payment to Hyde's son of \$50 or more was of substantial value.<sup>17</sup> In 2011, Hyde's son received at least 16 payments of \$50 or more from the Town as a result of the SFD payrolls prepared and presented for payment by Hyde which contained false information regarding hours worked by his son. Each of these payments was an unwarranted privilege of substantial value. In addition, where the excess payments to Hyde's son totaled over \$2,000, they were cumulatively of substantial value.

***The Privileges were not Properly Available to Similarly Situated Individuals***

The payments to Hyde's son were unwarranted privileges that were not properly available to similarly situated individuals. First, no SFD firefighter/EMT was entitled to be paid for call and station coverage work he had not performed. Second, no SFD firefighter/EMT was entitled to be paid for more hours of repair and maintenance work than he actually performed. Accordingly, each of the payments was an unwarranted privilege of substantial value which was not properly available to Hyde's son or to similarly situated individuals.

Accordingly, we find that the preponderance of the evidence establishes that between January and December 2011, Hyde knowingly or with reason to know used his official position as Fire Chief to secure for his son unwarranted privileges of substantial value, i.e., multiple payments of \$50 or more from the Town, that were not properly available to similarly situated individuals. Therefore, we find that Petitioner has proved that Hyde violated § 23(b)(2)(ii) with respect to the 2011 Town payments to his son.

**B. The Alleged § 23(b)(4) Violation based on Hyde's Presentation of Payrolls**

The evidence establishes that, between January and December 2011, Hyde deliberately and intentionally prepared and presented to his employer, the Town, sixteen payrolls seeking, among other things, payments of substantial value to his son for work his son had not performed. Insofar as these payrolls requested Town payments to Hyde's son based on work he had not performed, they were false or fraudulent claims for payment.

First, the evidence establishes that the payrolls were false claims for payment in that they requested payments under false pretenses. That is, the payrolls sought payments to Hyde's son for hours and types of work that he had not in fact performed during the

relevant periods. Second, the evidence establishes that the payrolls were false claims for payment in that they sought payments to Hyde's son for a total of at least about 156 hours of work that he did not perform at all.

The evidence further establishes that Hyde knew or had reason to know of both of these falsities at the time he presented the payrolls for payment. Hyde's testimony concerning how he purposefully altered the call sheets on which the payrolls were based in order to pay his son for repair and maintenance establishes his knowledge of false pretenses under which the payrolls were presented. Hyde's knowledge or reason to know of the overpayments sought by the payrolls he presented is established by the evidence of his recklessness in failing to take reasonable steps to ensure that his son's work was accurately recorded.

Accordingly, we find that the preponderance of the evidence establishes that between January and December 2011, Hyde knowingly or with reason to know presented to his employer, the Town, sixteen false or fraudulent claims for payments of substantial value to his son for work his son had not performed. Therefore, we find that Petitioner has proved that Hyde violated § 23(b)(4) with respect to the 2011 Town payments to his son.

**C. The Alleged § 23(b)(2)(ii) Violation based on Hyde's Use of the Generator**

The evidence establishes that Hyde, acting on his authority as Fire Chief, had the SFD generator installed at his home and connected to his home's electrical power system. Hyde testified that he did so in the interest of public safety in order to power his SFD radio during power outages. Having the generator so installed spared Hyde the inconvenience of returning to his home during extended power outages in order to refuel the generator as he had done previously, and was of some benefit to Hyde personally in ensuring that his home would not freeze.

There is no evidence of the value of any personal benefit to Hyde derived from having the SFD generator installed at his home. The purchase cost of the generator does not establish the value of its use. More importantly, there is no evidence that having the generator so installed was an unwarranted privilege not properly available to similarly situated individuals. The fact that other SFD firefighters were not provided with generators for their homes does not prove this element of the alleged violation given that

they were not similarly situated individuals to Hyde as the fulltime SFD Fire Chief. Thus, the evidence does not support the conclusion that it was an unwarranted privilege for Hyde to use the SFD generator at his home to power his SFD radio. The fact that Hyde received a personal benefit incidental to that use does not prove that the use was unwarranted.

Accordingly, we find that the preponderance of the evidence does not establish that Hyde by installing the SFD generator at his home knowingly or with reason to know used his official position as Fire Chief to secure for himself an unwarranted privilege of substantial value that was not properly available to similarly situated individuals. Therefore, we find that Petitioner has failed to prove that Hyde violated § 23(b)(2)(ii) with respect to his use of the SFD generator.

#### **V. Conclusions and Findings**

For the above stated reasons, we conclude and find that Petitioner has proved by a preponderance of the evidence that Hyde violated G. L. c. 268A, § 23(b)(2)(ii), by, as Fire Chief, causing unwarranted payments of substantial value to be made by the Town to his son. We further conclude and find that Petitioner has proved by a preponderance of the evidence that Hyde violated G. L. c. 268A, § 23(b)(4) by, as Fire Chief, presenting false payrolls to the Town for payments of substantial value to his son. Finally, we conclude and find that Petitioner has not proved that Hyde violated § 23(b)(2)(ii) with respect to his use of the generator.<sup>18</sup>

#### **VI. Order**

Accordingly, having found that Hyde violated G. L. c. 268A, § 23(b)(2)(ii) and § 23(b)(4) as specified above, the Commission, pursuant to the authority granted it by G. L. c. 268B, § 4(j), hereby **ORDERS** Hyde to pay a civil penalty of \$7,500.<sup>19</sup>

**DATE AUTHORIZED:** November 20, 2014

**DATE ISSUED:** December 17, 2014

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<sup>1</sup> Commissioner Paula Finley Mangum participated in the Commission's initial deliberations but not in the decision, which was authorized after her term ended. Her successor, Commissioner David A. Mills, did not participate in the deliberations or in the decision. Accordingly, neither Commissioner Mangum nor Commissioner Mills is a signatory to this Decision and Order.

<sup>2</sup> Section 23(b)(2)(ii) provides that no municipal 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 or exemptions which are of substantial value and which are not properly available to similarly situated individuals."

<sup>3</sup> Section 23(b)(4) provides that no municipal employee shall knowingly or with reason to know "present a false or fraudulent claim to his employer for any payment or benefit of substantial value."

<sup>4</sup> Hyde testified that he would first write the information from the call sheets down on a "scratch sheet" and then enter the information from the scratch sheet into an Excel program to create the payroll, which he would then turn in to the Town Accountant's office.

<sup>5</sup> Hyde's testimony that in altering the call sheets he was not trying to falsify the payroll records was not credible. Hyde testified that he checked his son's name on the call sheets immediately prior to completing the payroll for presentation to the Town for payment, which according to his own testimony was often weeks or months after his son purportedly performed SFD repair and maintenance work, which work was otherwise undocumented. We find that Hyde's alteration of the call sheets is more consistent with an intent on his part to create a false record to support his payment of his son for call and daytime station coverage work that his son did not perform than it is with an intent to keep track of repair and maintenance work purportedly performed by his son at some earlier, unspecified time.

<sup>6</sup> The evidence in the record is insufficient to establish the precise number of hours.

<sup>7</sup> We conclude that the amounts stated as due to Hyde's son in each payroll presented to the Town by Hyde in 2011 were in fact paid by the Town to Hyde's son. Hyde does not contest that his son was paid pursuant to the payrolls that he presented to the Town. Hyde testified that he entered the amounts in the payrolls so that his son would be paid for the work that he did for the SFD and his son testified that he was paid for that work. We find that Hyde's son was paid by the Town as directed by Hyde in the payrolls he submitted to the Town.

<sup>8</sup> Theroux and Miltimore testified that they did not check Hyde's son's name off on any of the 36 call sheets that collectively they completed and submitted for their daytime station coverage in 2011 and that

Hyde's son did not perform daytime station duty with them on any of those 36 days. Hyde testified that he added his son's name to call sheets in order to pay him for other work.

<sup>9</sup> Sixteen payrolls include payments to Hyde's son for hours of daytime station duty that Hyde falsely credited to his son on call sheets completed by Theroux and Miltimore.

<sup>10</sup> Not all of the payrolls presented by Hyde or the payments to the Town made to Hyde's son during 2011 are alleged by Petitioner to have been based on false information. Thus, the 23 SFD payrolls in evidence as Exhibit 4 indicate that Hyde's son was paid by the Town a total of approximately \$12,411 between January 6 and December 8, 2011. Petitioner challenges only about \$6,646 of that total.

<sup>11</sup> We found the rebuttal testimony of Miltimore and former SFD Firefighter William Kaleta credible on this point.

<sup>12</sup> Hyde testified that his son did repair and maintenance work in addition to the work described in his son's testimony, and that his son did not "put in" for all his hours. Hyde's testimony was vague and did not establish what, if any, additional work was done, when it was done or how many hours it took. While Hyde's son testified to specific jobs and hours worked, the hours were at best rough estimates. It was not believable that three years later, without any records to refresh his memory, Hyde's son could recall the jobs he performed and the amount of time those jobs took with any reliability. Accordingly, neither Hyde's nor his son's testimony concerning the work he purportedly did for the SFD was wholly credible. Given, however, that some of the work performed by Hyde's son was witnessed by other SFD firefighters (although it was not established that the work was witnessed in 2011), we do not entirely disbelieve Hyde and his son's testimony that his son performed some repair and maintenance work.

<sup>13</sup> "Knowingly" is not defined in the conflict of interest law. The Commission has noted that it has been defined as "in a knowing manner . . . with awareness, deliberateness, or intention" and that an act is done knowingly "'if it is [the] product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences.'" *In the Matter of Frederick Foresteire*, 2009 SEC 2220, 2225 (citations omitted).

<sup>14</sup> "Reason to know" is also not defined in the conflict of interest law. The Commission has noted

that it has been defined to "indicat[e] or denot[e] that the actor has, within his knowledge, facts from which a reasonable person of ordinary prudence and intelligence might infer the existence of a certain fact in question." *In the Matter of Frederick Foresteire*, 2009 SEC 2220, 2225 (citations omitted).

<sup>15</sup> A privilege is a "special advantage, immunity, right or benefit granted to or enjoyed by an individual, class or caste." *In the Matter of Charles Famolare*, III, 2012 SEC 2425, 2435, n.12 (citation omitted).

<sup>16</sup> An "unwarranted privilege" is one that is "[I]acking in adequate or official support" or "having no justification; groundless." See *EC-COI-98-2*.

<sup>17</sup> Anything worth \$50 or more is of substantial value for the purposes of G. L. c. 268A. 930 CMR 5.05.

<sup>18</sup> Hyde's Answer raised several affirmative defenses. Hyde has not supported with evidence or otherwise pursued any of these defenses and none of them are meritorious.

<sup>19</sup> Although under G. L. c. 268A, § 21 the Commission has the authority to require restitution as an additional remedy where appropriate, under the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a), such relief may be granted only if the Order to Show Cause expressly states that such relief is sought and specifies the nature of the relief sought. Here, the Order to Show Cause did not state that relief was sought under § 21. Accordingly, we do not have occasion to determine whether restitution would be appropriate as an additional remedy in this matter.



**ADVICE**



**EDUCATION**



**DISCLOSURE**



**ENFORCEMENT**



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