

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 21-0003

IN THE MATTER

OF

GARY HALEY

Appearances: Richard Gross, Esq. for Respondent Gary Haley
Candies Pruitt, Esq. for Petitioner

Commissioners: Krokidas, Kantrowitz, Martinez, Edwards, Jr. & Hackshaw

Presiding Officer: Eron Hackshaw

FINAL DECISION AND ORDER

I. INTRODUCTION

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

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

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

- Violated § 19 by participating as a Select Board member in a particular matter in which to his knowledge he had a financial interest by deciding that he would personally install conduits for telecommunications wires during a project at Aquinnah Circle "and effectively awarding himself a contract with the Town;"

- Violated § 20 by having a financial interest, of which he had knowledge or reason to know, in a contract made by the Town in which the Town paid him for services and materials he provided to lay conduits for telecommunications wires at Aquinnah Circle;
- Violated § 19 by participating as a Select Board member in a particular matter in which to his knowledge he had a financial interest by voting to approve an expense warrant that included the invoice that he had submitted to the Town for the work; and
- Violated § 23(b)(4) by, knowingly or with reason to know, submitting a false or fraudulent claim to the Town for payment of substantial value because the invoice misdescribed and overstated the labor he provided for the conduit installation.

II. PROCEDURAL HISTORY

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

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

III. FINDINGS OF FACT

Events prior to the beginning of the work at Aquinnah Circle

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

The Town of Aquinnah Community Preservation Committee ("CPC") undertook a project to improve the aesthetics at Aquinnah Circle. The chairman of the CPC was Derrill

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

Bazzy. Among other things, the Town wanted to remove overhead wires at Aquinnah Circle and bury them underground. There was discussion about the project for eight to ten years.

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

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

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

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

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

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

Haley’s conversations with Comcast and Verizon ultimately did not result in any contract or agreement.

In the spring of 2018, Eversource contacted CPC Chairman Bazzy about starting its part of the work. Town Administrator Madison called Comcast and Verizon, told them that the trench was going to be opened, and asked them to install their conduits. Comcast and Verizon could not accommodate his request. Comcast had no crew that was able to coordinate with Eversource at that time.

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

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

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

The arrangement that Haley made with Madison

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

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

Haley told Madison he would put the pipes in "as a volunteer for free." Haley did not tell Madison that he was going to charge him for it. Neither Madison nor Haley thought they had made a contract. Haley had volunteered to help out the Town before and did not charge for the work. Madison understood that Haley had done so in the past.

The work Haley did at Aquinnah Circle

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

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

Bettencourt's view was that he and Maciel were not required to do the backfill between the electrical and telecommunications conduits to facilitate Haley's work. In the calculation of

costs that Bettencourt had done for Eversource, Bettencourt only included the cost of opening the trench, laying the high voltage conduit and then filling and closing the trench, not the additional cost of laying the sand over the high voltage conduits and waiting for the low voltage conduits to be laid and then filling and closing the trench.

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

Haley's invoice

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

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

The invoice states:

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

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

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

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

Charges for two laborers at Aquinnah Circle

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

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

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

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

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

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

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

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

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

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

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

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

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

Police Chief Belain saw Haley once working at Aquinnah Circle after the trench had been closed. Haley was working at a telephone box at the bottom of the stairs of Aquinnah Circle that lead up to the cliffs and the shops.

Payment of Haley's invoice

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

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

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

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

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

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

IV. BURDEN OF PROOF

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

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

To prove that Haley violated § 19, Petitioner must prove by a preponderance of the evidence that Haley (a) was a municipal employee; and (b) participated as such an employee; (c)

in a particular matter; (d) in which he had a financial interest; and (e) that he had knowledge of the financial interest. *In the Matter of Paul Pathiakis*, 2004 SEC 1167, 1174.

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

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

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

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

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

The evidence is clear that Haley, a Select Board member, as well as Madison, the Town Administrator, represented the Town at meetings with representatives for Eversource, Comcast and Verizon about the burial of the overhead wires at Aquinnah Circle. When a problem arose and Comcast and Verizon informed Madison that they would not send crews to install the conduits, Madison conferred with Haley. As a Select Board member, Haley was Madison’s direct supervisor. He told his subordinate that he would install the conduits for the telecommunications wires. By doing so, he participated as a Select Board member in the decision about who should install the conduits for the Town by deciding to do it himself.

Before the work even began, Bettencourt informed Haley that he would have to lay the layer of sand over the electrical conduits himself. Haley knew that the scope of the work and associated costs had increased and that he could not do the work by himself or do it for free. Without consulting again with Madison about the significant change in circumstances, he followed through with the decision to do the work for the Town nonetheless. He unilaterally decided that the Town would be charged for the work, determining on his own what the payment to himself would be.³ See *In the Matter of Howard Hansen*, 2017 SEC 2604, 2610-2611

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

³ In the conflict of interest law, “municipal employee” is defined to include “a person performing services for... a municipal agency, ... whether serving with or without compensation...” G.L. c. 268A, § 1(g). Upon deciding for

(Stoughton Town Moderator had a financial interest in a particular matter when he decided to charge the Town for payments to himself and his own printing business for materials used by him as Town Moderator), *In the Matter of Stephen Comtois*, 2020 SEC 2707, 2710-2711, *aff'd*, *Comtois v. State Ethics Commission*, Suffolk Superior Ct. 2084CV02105 (2021) (Brookfield Selectman acted as a Selectman in a particular matter in which he had a financial interest when he voted to send an article to Town Meeting about whether the Town should accept a donation of a parcel of land and then called the realtor the next day to report the results of the meeting and offered to purchase the land himself). The work was already completed when Haley gave Madison an invoice for \$17,445 for the Town to pay.

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

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

We agree with Petitioner that there was no emergency. We base this conclusion on the following evidence. Baronas from Comcast, who was in the business of coordinating telecommunications installations, opined that there was no emergency. While the Eversource trench was open, police details prevented harm to the public. If the Eversource trench had to be closed and this gave Eversource an easement, Comcast had a franchise agreement with the Town, and as Petitioner notes, the Federal Cable Act, 47 U.S.C. § 541(a)(2) authorizes Comcast to construct its cable system "over public rights-of-way, and through easements." Even Madison acknowledged that the Eversource trench could have been closed and later reopened to enable

the Town that he would install the telecommunications conduits himself, Haley was a municipal employee both as an electrician for the Town and as a Select Board member, and he continued to participate in that decision in both capacities.

installation of the telecommunications conduits. While such an approach could have increased costs for the Town, it was not an emergency.⁴

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

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

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

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

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

Petitioner argues that Haley had a financial interest in a contract made by the Town as a result of deciding, in his capacity as a Select Board member, that he and his d/b/a would install the conduits for the Comcast and Verizon wires. According to Petitioner, the evidence shows that Haley's business installed the conduits, that he issued an invoice to the Town, and the Town paid the invoice. Consequently, Haley installed the conduits in exchange for payment and,

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

Petitioner concludes, this was a contract. Petitioner likens Haley with the Town Moderator in *In the Matter of Howard Hansen*, 2017 SEC 2604, who agreed with himself to pay amounts from the Town Moderator's budget to himself or his own printing company for materials he used as Town Moderator.

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

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

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

Having initially told Madison that he would install the telecommunications conduits for free, Haley did all of the work and then submitted his invoice. "That which is presented as a gratuity cannot thereafter be transformed into the basis for a contract, simply because a change of circumstances may make it highly desirable for the donor to recover pay for the gift." *Silano v.*

⁵ Haley argues that payment for his work saved the Town money, but at least arguably his work cost the Town more than the value of his services. On top of Haley's unanticipated invoice, on July 3, 2018, Bettencourt submitted an invoice for \$12,881.50 to Madison, contending that Haley's delays at the Eversource trench cost him money, and he threatened legal action if the invoice was not paid. Although Madison thought this was extortion, he reduced the amount to \$11,881.50 and put the invoice into the expense warrant process. When Bettencourt's bill came up at a Select Board meeting on September 5, 2018, Haley said, "we're all set with that," meaning, "Push it through for payment."

Carosella, 272 Mass. 203, 206 (1930) (no contract found where relative furnished defendant and his daughter with board, room, care and clothing from 1922 to 1927 with no intention to charge them, and then sought compensation for these items when a financial controversy arose between them in 1937). See also *Ramseyer v. Conlon*, 303 Mass. 270, 274 (1939) (“...the rendition of services or the transfer of property accompanied by a donative intention fixes and establishes definitely and finally the rights of the parties and prevents a gift from ripening into a contract.”) The Town had no contractual obligation to pay Haley’s invoice, even if it eventually did so.

The evidence shows that Haley, who had a duty as a Select Board member to look out for the Town’s best interests, essentially decided on his own to transform a gift from him to the Town into a charge that the Town should pay, and then did not inform Madison or any other Town employee about this change until work valued at \$17,445 already had been completed and he asked the Town to pay for it. However objectionable this conduct might be, it did not create a contract.

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

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

VII. SECTION 19 CLAIM – Approval of the payment warrant

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

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

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

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

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

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

The school committee member had provided information that the school committee members never reviewed individual bills on the warrants, and that if she signed warrants that included her husband's and son's bills, she was just approving the total amounts. *Id.*

The Commission cited the following law:

"If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with 'knowledge' of what he would have seen had he looked. *Demoulas v. Demoulas*, 428 Mass. 555, 577 (1998) (quoting *West's Case*,

313 Mass. 146, 151 (1943)). "Proof of actual knowledge is frequently shown where one is in possession of information of such weight and reliability that men commonly act upon it as true. Absolute certainty is not required." West's Case, 313 Mass. at 150. Where one has sufficient information to know a fact, then one cannot avoid the consequences of knowledge by remaining in willful ignorance. *Id.* at 1505 1. See also *Van Christo Advertising, Inc. v. M/A-COM/LCS*, 426 Mass. 410, 416-17 (1998) (claim of willful ignorance will not be excused if information would have been known had person simply not consciously disregarded it).

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

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

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

Haley also notes that the *Montalbano* letter recommended that staff have a practice to avoid having a board member sign warrants that include invoices for family members, and that the Aquinnah Select Board did have such a practice, but it was not followed. In particular, he points to a "practice" that the Town Accountant has of putting a note on an expense warrant to alert a Select Board member when the expense warrant includes an invoice payable to the Select Board member. As the Town Accountant testified, she inadvertently failed to follow the "practice." Haley complains that, as a result, no one told him that his invoice was in warrant TW18-29.

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

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

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

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

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

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

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

Charge for Haley's work

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

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

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

closed, Smalley did not recall or see Haley doing any work with respect to the electric lines at the lighthouse. At first, Smalley testified that he believed that Eversource did that work.

Smalley then appeared to concede that Haley did the work. He was asked the following “if/then” question, “If Mr. Haley had been working up there, don’t you think he was the guy that buried those wires?” Smalley answered, “Yes.” Smalley also testified, however, that he had no idea who did that work and only assumed that Haley did it because Smalley had delivered conduit to Haley.

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

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

Charge for work by two laborers

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

On the whole, while the evidence may not prove that Jenkins and Addonizzio do not exist or were concocted, it raises significant questions about whether their existence is verifiable and whether they did the work for Haley at Aquinnah Circle. The only statements that Jenkins and/or Addonizzio worked at the site were made by Haley and contained in an Affidavit sent from the e-mail address, justinajenkins367@gmail.com, to Haley’s attorney. For the following

reasons, we find that Haley's testimony is not credible, and that the Affidavit of Justina Jenkins, which is hearsay, has insufficient indicia of reliability to give it any weight

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

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

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

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

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

Atty. Gross has never spoken with or met Jenkins. Information that Petitioner obtained from Google suggests that the e-mail address, justinajenkins367@gmail.com, was created solely for the purpose of having the exchange of e-mails with Atty. Gross and never used again.⁶ The first log-in for the justinajenkins367@gmail.com e-mail address was on 10-07-2021 at 16:06:10 Z. Converted from Z, or Zulu or UTC, time to Eastern Daylight Savings Time, the time of the first log-in was 12:06 p.m. The first message from justinajenkins367@gmail.com to Atty. Gross

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

was on 10-07-2021 at 12:49 p.m., within 45 minutes of the first log-in. An Affidavit with a typed signature for Justina Jenkins was sent from justinajenkins367@gmail.com to Atty. Gross on October 18, 2021, and Google shows no subsequent log-ins after that exchange.

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

At a State Ethics Commission hearing, all parties have the right to call and examine witnesses and to cross-examine witnesses who testify. 930 CMR 1.01(10)(f). Petitioner had no opportunity to inquire whether in fact it was Justina Jenkins who provided the Affidavit or to cross-examine the affiant about its contents. Where the person sending e-mails from justinajenkins367@gmail.com deliberately was inaccessible and sought limited involvement in Haley's case, it is unrealistic to conclude that Petitioner could have subpoenaed the person if the Petitioner chose to do so. *Compare Embers*, 401 Mass. at 531. For these reasons, we give no weight to the Affidavit or the statements in it about what work Jenkins and/or Addonizzio did with Haley.

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

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

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

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

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

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

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

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

IX. CONCLUSION

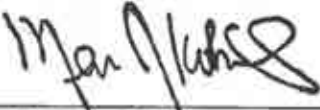
Petitioner has proved by a preponderance of the evidence that Haley violated § 19 when he participated as a Select Board member, first, in deciding that he would install the telecommunications conduits at Aquinnah Circle for the Town himself and, second, in approving the expense warrant which included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

X. ORDER

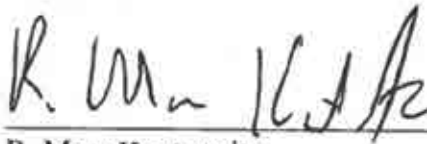
Having concluded that Respondent Gary Haley violated § 19, and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby ORDERS Gary Haley to pay a civil penalty of \$10,000 as follows: \$5,000 for his violation of § 19 by participating as a municipal employee in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

DATE AUTHORIZED: October 14, 2022

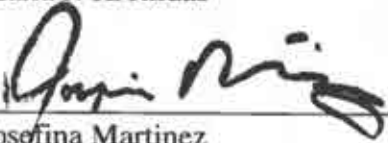
DATE ISSUED: October 25, 2022



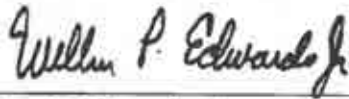
Maria J. Krokidas



R. Marc Kantrowitz



Josefina Martinez



Wilbur P. Edwards, Jr.



Eron Hackshaw

NOTICE OF RIGHT TO APPEAL

Respondent is notified of his right to appeal this Decision and Order pursuant to G.L. c. 268B, § 4(k) by filing a petition in Superior Court within 30 days of the issuance date.

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