

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. _____

SHANNON O'BRIEN,

Petitioner,

v.

DEBORAH GOLDBERG, Treasurer
and Receiver General of the Commonwealth of Massachusetts
(in her official capacity)

Respondent.

SHANNON O'BRIEN'S PETITION IN THE NATURE OF CERTIORARI

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I. INTRODUCTION

This is a Petition for Certiorari pursuant to G.L. c. 249, § 4, on behalf of Petitioner Shannon O'Brien ("Petitioner"), to correct errors committed by the Respondent, the Treasurer of the Commonwealth, in a proceeding relating to the Petitioner's removal as Chairperson of the Cannabis Control Commission under G.L. c. 10, § 76.

This case presents important and undecided questions concerning the removal of a commissioner from an independent agency of the Commonwealth. It presents a number of issues of first impression, as the enabling statute of the Commission has never been construed by this Court. The case involves the failure to implement basic safeguards to prevent the abuse of political power to destroy the reputation and career of an honest public servant. More than that, however, it involves the welfare of an organization which is not yet fully developed but is responsible for regulating a major new industry in this state. The significance of this Petition also lies in its general application to the operation and control of independent agencies in the Commonwealth and the powers over such agencies by constitutional officers.

Petitioner requests that this matter be reserved and reported to the Full Court. In the alternative, Petitioner requests that the case be taken up by the Single Justice and that such Justice order the production of the complete record of the proceedings now in the custody of the Treasurer, and then set a briefing schedule and a hearing date.¹

¹ What follows below is a compressed version of both the facts and the key arguments. It does not include all of the evidence and argument that would be presented before either the Full Court or the Single Justice after the administrative record is filed and complete briefing. The appendix filed herewith (references made as "APP_[page number]") is by no means the complete record that the Treasurer must file with the Court.

II. PARTIES AND COMPLAINANTS

Petitioner, Shannon O'Brien

Petitioner is a well-known, long vetted, and highly experienced public official, a former Treasurer of the Commonwealth herself. She is a no nonsense, blunt person who has a strong record of bringing needed change to various organizations. She is also an individual long committed to equity for disadvantaged communities. At the CCC, she made one of her main goals to remedy the failure of the agency to deliver on the statutory promise of benefitting the communities who suffered most from the scourge of the war on drugs.

In August 2022, Treasurer Goldberg appointed Petitioner as Chair of the CCC pursuant to G.L.c. 10, § 76. She was sworn in on September 1, 2022 for a five-year term. Treasurer Goldberg did so after informing Petitioner that she was not going to choose a new Chair from the pool of applicants she had received (including Commissioner Nurys Camargo (“Commissioner Camargo”)). The Treasurer had asked Petitioner to apply for the Chair position after extending the application period specifically for Petitioner. Petitioner was skeptical about the potential opportunity—particularly after the former Chair, Steven Hoffman, resigned under publicly unknown circumstances—but she determined that filling this role would be consistent with her decades long record of public service and expanding economic opportunities for all citizens of the Commonwealth and would, in particular, provide Petitioner with the opportunity to leverage her experience to make improvements in an obviously troubled state agency.

Deborah Goldberg, Treasurer

Defendant Deborah Goldberg is the Treasurer and Receiver General of the Commonwealth of Massachusetts with a principal place of business at 1 Ashburton Place, 12th Floor, Boston, Massachusetts 02108. Under G.L.c. 10, § 76, Treasurer Goldberg has the power to appoint one commissioner that “shall have experience in corporate management, finance or

securities” and to designate the Chair.² Treasurer Goldberg appointed Petitioner to be the commissioner of the CCC in the summer of 2022 after she confided to Petitioner and others that the current slate of candidates were not qualified to serve as Chair.

Shawn Collins

Collins was the CCC’s inaugural Executive Director. He served from October 2017 through December 2023. Treasurer Golberg endorsed him, calling the former Chair multiple times to ensure that Collins was appointed. Prior to his service at the CCC, Collins served as Legislative Director and Assistant Treasurer - Director of Policy and Legislative Affairs to Treasurer Goldberg. While serving in her office, he was given responsibility for developing the original CCC structure and policies, even before the marijuana referendum had passed. When he left to take over the Executive Director’s post at the Commission, the Treasurer praised his talent and sent him off with a valedictory that “[y]ou are and will always be, part of our family.”

During Collins’ time at the Treasurer’s office, he had also worked closely with Deputy Treasurer Sarah G. Kim (“Deputy Treasurer Kim”) and they developed a professional and personal friendship. Later, after the CCC’s former Chair, Steven Hoffman, resigned in the spring of 2022, Goldberg appointed Kim as Interim Chair of the CCC. In that capacity Kim and Collins worked closely together until Petitioner was appointed in September 2022 and Deputy Treasurer Kim returned to the Treasurer’s office.

Commissioner Camargo

Commissioner Camargo sits in the social justice commissioner seat at the CCC. She was appointed in 2021 by then-Governor Charlie Baker, Treasurer Deborah Goldberg, and then-Attorney General Maura Healey. She, and Commissioner Callender Concepcion, applied to Treasurer Goldberg for the Chair position in 2022. According to former Chair Hoffman, he

² The Treasurer also jointly appoints two other commissioners along with the Governor and Attorney General.

informed Treasurer Goldberg that Commissioner Camargo did not meet the statutory qualifications to be Chair. He felt she was not collaborative and was more focused on her own agenda and brand than the CCC's. APP_001600-001601. Commissioner Camargo waged a campaign involving a number of current and former public and political figures to pressure Treasurer Goldberg to appoint Commissioner Camargo as the next Chair.

III. FACTUAL BACKGROUND

The Cannabis Control Commission

The CCC was originally established in Chapter 334 of the Acts of 2016. There, the Treasurer could appoint three commissioners and remove any member for “neglect of duty, misconduct or malfeasance in office.” Chapter 55 of the Acts of 2017, “An Act to Ensure Safe Access to Marijuana” (codified as G.L. c. 10, § 76) amended the law with serious changes, including taking away the sole appointment and removal powers from the Treasurer, giving appointment and removal powers to the Governor and Attorney General. The new amendments also included five heightened potential reasons for a commissioner’s removal³ and that they would be provided, before removal, “with a written statement of the reason for removal” and an “opportunity to be heard.”

³ Which were:

if the commissioner: (i) is guilty of malfeasance in office; (ii) substantially neglects the duties of a commissioner; (iii) is unable to discharge the powers and duties of the office; (iv) commits gross misconduct; or (v) is convicted of a felony. The treasurer and receiver-general, the governor and the attorney general may, by majority vote, remove a commissioner who was appointed by majority vote of the state treasurer, the governor and the attorney general if the commissioner: (1) is guilty of malfeasance in office; (2) substantially neglects the duties of a commissioner; (3) is unable to discharge the powers and duties of the commissioner's office; (4) commits gross misconduct; or (5) is convicted of a felony.

Various Commonwealth resources reference the CCC's independence.⁴ The enabling statute itself lays out its structure, including the powers and duties of the Appointing authorities, the Chair, Commissioners and Executive Director. Currently there are approximately 125-150 employees at the CCC. The agency was responsible for approximately \$322 million in tax and non-tax revenue in fiscal year 2023. It has overseen approximately \$7 billion in sales since 2018.⁵ Despite its early success, the Legislature has recently begun hearing whether the CCC's structure needs change due to operational issues and the internal turmoil plaguing the CCC.⁶

The relevant provisions of G.L. c. 10, § 76 are as follows: (1) the Treasurer solely appoints one commissioner as well as jointly appoints two commissioners with the Governor and Attorney General;⁷ (2) the Treasurer designates the Chair;⁸ (3) each commissioner serves a five year term;⁹ (4) an appointing authority "may" remove a commissioner for five enumerated reasons and "shall" provide the commissioner "a written statement of the reason for removal and an opportunity to be heard" "before" removal;¹⁰ (5) the five reasons for removal are "if the commissioner: (i) is guilty of malfeasance in office; (ii) substantially neglects the duties of a

⁴ The official website of the Commonwealth refers to the CCC as one of sixteen independent state agencies. <https://www.mass.gov/topics/constitutionals-independents> (last accessed October 28, 2024). The Treasurer's website does not list the CCC as one of the departments or commissions she oversees. <https://www.masstresury.org/departments> (last accessed October 28, 2024).

⁵ <https://masscannabiscontrol.com/2024/04/massachusetts-marijuana-establishments-surpass-6-billion-in-gross-sales/> (last accessed November 6, 2024).

⁶ <https://malegislature.gov/Events/Hearings/Detail/5030> (last accessed November 7, 2024) ("[t]he Joint Committee on Cannabis Policy will hold an informational hearing to aid in the Committee's reconsideration of the Cannabis Control Commission's enabling statute[.]"

⁷ G.L. c. 10, § 76(a).

⁸ G.L. c. 10, § 76(j).

⁹ G.L. c. 10, § 76(b).

¹⁰ *Id.*

commissioner; (iii) is unable to discharge the powers and duties of the office; (iv) commits gross misconduct; or (v) is convicted of a felony[;]” (6) the Chair “shall have and exercise supervision and control over all the affairs of the commission... [and] shall make such division or re-division of the work of the commission among the commissioners as the chair deems expedient;”¹¹ and, (7) “[t]he commission shall appoint the executive director . . . [who] shall serve at the pleasure of the commission.”

The statute does not provide for the Treasurer to oversee or have any involvement with the day-to-day operations of the CCC. Indeed, as the Treasurer herself has acknowledged, “the Treasurer has no other authority, oversight, management, or influence over the [CCC]”¹² and that “[w]e don’t have oversight. We have no way of really knowing what goes on over [at the CCC], so I have absolutely no idea... **I have no oversight**[.]”¹³ Treasurer Goldberg has also acknowledged that “Chair O’Brien is not the Treasurer’s employee; she is an employee of the [CCC]... the Treasurer is not Chair O’Brien’s employer[.]”

The State of the CCC in September 2022

When Chair O’Brien arrived at the CCC she found an agency powerless to complete its missions to license, regulate and assist the billion dollar per year industry as well as to serve the consuming public. The agency was rife with self-destructive conflict amongst staff which was divided into fiefdoms. As Attorney Thomas Maffei, the “Officiant” at O’Brien’s hearing later observed, the staff was riven by “turmoil, turf battles and backstabbing.” APP_001576. There

¹¹ G.L. c. 10, § 76(h).

¹² <https://www.wgbh.org/news/politics/2023-09-28/mass-cannabis-commission-chair-sues-state-treasurer-over-suspension> (last accessed October 28, 2024) (“The role of the Treasurer is to appoint the Chair and jointly appoint two other Commissioners, but beyond that the office of the Treasurer has no other authority, oversight, management, or influence over the Commission,” Goldberg said.”).

¹³ <https://masslawyersweekly.com/2024/10/16/goldberg-seeking-new-chair-as-lawmakers-mull-ccc-changes/> (last accessed October 29, 2024).

was constant dissension between internal cliques. CCC employees would weaponize human resources (“HR”) and file meritless complaints against other employees and commissioners to force their foes to resign or be terminated based on false charges. Staff were openly insubordinate to Commissioners and did not answer to them. Many top leadership positions were empty after officials left to avoid the factionalism. All of this was so poisonous that the Commission spent more than \$160,000 dollars on an outside mediator in what turned out to be a failed effort to solve the problems.

A major obstacle to any progress was the Executive Director, Collins, who was responsible for all operations of the agency. As both Steve Hoffman and Commissioner Kimberly Roy testified in this case—and were corroborated by four of the five current Commissioners interviewed by an investigator—Collins was incapable of running the agency. He insisted on having all the power—effectively neutering the Commissioners by forbidding staff to communicate with them without going through him—but he would not, or could not, exercise any control on his own. APP_001478-001518; APP_001592-001601. He played commissioners off one another and used the Open Meeting law as a tool to avoid having to communicate. APP_001597. He refused to meet with the Petitioner on a regular basis, and repeatedly undermined her authority.

Collins had long been discussing resigning from the CCC, even before Petitioner’s appointment because he said he was burnt out. APP_000246. When Petitioner was appointed, he informed her that he was fatigued and “might not stay much longer.” *Id.* He started interviewing for outside employment in February 2023. *Id.* However, he refused to commit to a plan and his indecisiveness crippled the CCC.

April Meeting with Treasurer Goldberg and Deputy Kim

In April 2023, Treasurer Goldberg and Deputy Treasurer Kim met with Petitioner.

Petitioner informed Treasurer Goldberg and Deputy Treasurer Kim that Collins may need to be replaced because he was an ineffective manager. Deputy Treasurer Kim became visibly upset and strongly defended Collins because of her and Collins' close relationship. Deputy Kim also objected because Collins and his spouse were expecting a new child. After this meeting, the relationship between O'Brien and Collins further deteriorated.

Efforts to Build a Case Against Petitioner

In the meantime, in February, CCC warfare inevitably came to O'Brien. Cedric Sinclair, the CCC's Chief of Communications, ("Sinclair") filed an HR complaint against her¹⁴ and CCC, through its outside counsel, retained Attorney Kimberly Jones ("Attorney Jones") to investigate the complaints. Ultimately, Jones found that Sinclair's complaints against Petitioner were meritless.

In late May, before Jones' investigation was closed, a new complaint was filed, this time by Commissioner Camargo (Sinclair's ally in the CCC wars). This complaint was likewise assigned to Attorney Jones for investigation. Commissioner Camargo complained that certain incidents involving Petitioner from January 24, 2023 until April 24, 2023 had made her "professionally and personally uncomfortable" because she believed these incidents had "racial motives and biases." She made accusations that Petitioner "disparaged" her but did not offer any specific support for the claim. She also complained that Petitioner had called Sinclair her buddy; she said he was a professional, but not personal friend. Other "anonymous" witnesses emerged from the shadows to make accusations against Petitioner to Attorney Jones. Even before

¹⁴ Petitioner was never provided a copy of Sinclair's purported complaint.

interviewing any witnesses, Attorney Jones, with the CCC's blessing, decided to grant anonymity to potential witnesses against Petitioner if they asked for it.

By July 14, 2023, Attorney Jones' had not completed all of her interviews or produced a written report. However, Treasurer Goldberg already knew the outcome. She called her friend Edward J. Farley ("Farley")¹⁵ and during the fourteen-minute phone call, she informed Farley that the CCC was investigating Petitioner over allegations that she had made racially insensitive comments, that Petitioner would be "humiliated" by the information being shared in this investigation and that she "may be ultimately replaced by another [CCC] Commissioner that 'is a woman of color.'"¹⁶ APP_000778, ¶ 12.

During this period Collins began to compile a dossier containing supposed affronts to him by Petitioner. On July 18, Collins wrote an email to himself detailing a conversation where he claims Petitioner said the CCC was "rudderless" during a June parental leave, that she had a "blunt instrument" at her disposal to fire him and the Senate President had encouraged her to terminate Collins, but she did not want to use that "tool[.]" Then, on July 24, Collins' had a friend from law school (and business partner now) submit a public records request to the CCC. In it, he sought "any human resources complaints filed against and pertaining to Chairperson Shannon O'Brien from January 1, 2023 through the date of this request."¹⁷ Clearly efforts were being made to gather evidence for removal.

¹⁵ At the time, Farley was the Chief Marketing Officer at the Massachusetts State Lottery Commission. Farley previously had worked on Treasurer Goldberg's campaigns and often spoke with her and went out for meals together. APP_000776-777, ¶¶ 1-6.

¹⁶ Farley, and various employees at the Treasurer's office, later received a "Litigation Hold" letter from the Treasurer's counsel to "retain and preserve all records... which may be relevant to personnel matters and potential legal proceedings" regarding Petitioner. APP_000781-782.

¹⁷ Collins' business partner is an attorney who represents a CCC licensee. A former employee of that licensee had previously submitted a complaint about his former employer to Petitioner. Petitioner forwarded it to

The Meetings of July 27-28

By the end of July, conditions at the CCC had gone from bad to worse. Multiple critical stories were appearing in the press, including about significant management failures at the CCC. Internal governance squabbles, licensing delays, and a revolving door of top staff plagued the Commission. Licensees feared retaliation from CCC staff. The testing standards were failing, leading to the public consumption of tainted product. There was an impending deadline to complete social equity and other regulations required by new legislation that Collins had refused to oversee. The CCC was truly in “crisis” mode.¹⁸

The Commissioners held a public meeting on July 27. Just prior to the start of the meeting, Collins told Petitioner, privately and for the first time, that he would “take his 10 weeks of leave” starting on the following Monday (July 31). Petitioner told Collins that it was vital that he let the other Commissioners know of his plan that day since he had not provided the required notice to them. Collins agreed that he would make an announcement at the end of the public meeting. However, when the time came, he declined to do it.

The CCC meeting continued the following day, Friday, July 28. Petitioner believed that it was essential that the Commission be informed immediately that its Executive Director was going on extended leave the following Monday, and then would be resigning at the end of the year. So, she made the announcement herself. Collins was not in attendance. After the meeting, he had his friend Justin Shrader (the acting Chief People Officer, also out of the office that day)

Collins. The public records request followed shortly. Coincidentally, the principal of the CCC licensee lives on the same street as Collins.

¹⁸ Indeed, the next year the Office of the Inspector General stated “[t]here is a sense of urgency to act to resolve the leadership issues at the CCC. The chair has exercised her right to a hearing on her suspension by the Treasurer. The OIG does not have confidence that either the outcome of that hearing, whichever party prevails, or the adoption of a governance charter can resolve the leadership crisis at the CCC.”

send a blast email to Deputy Treasurer Kim, the Office of the Attorney General, and the Governor's office, and one employee at the Office of the Inspector General publicizing Collins' and others' complaints against Petitioner.

Treasurer Goldberg Immediately Calls O'Brien "On the Carpet"

On Monday morning (July 31), Treasurer Goldberg summoned Petitioner. They met over videoconference. The atmosphere was very tense. Treasurer Goldberg, noticeably impatient and uncomfortable with her inability to affect decisions about Collins, expressed her concern and anger about Petitioner's treatment of Collins at the Friday meeting which, she said, she had watched on video. She was especially put out by the Petitioner's announcement at the meeting that Collins would be leaving the following Monday and then resigning. She insisted that this was private and confidential information which should not have been disclosed in a public meeting. She added that the video showed that Petitioner had been "hysterical" and had lost the confidence of the CCC staff. Other than the Collins matter, no other issue was mentioned. Nothing about racially insensitive comments was raised. Treasurer Goldberg told Petitioner that she should resign, but Petitioner declined. No mention was made that suspension or removal were then being considered.

Sometime in August, Attorney Tracey Spruce was retained to investigate Collins's and Grace O'Day's (Petitioner's executive assistant) HR claims against Petitioner.¹⁹

September Events

On September 7, Petitioner received two documents from Deputy Treasurer Kim. One was a demand letter from Collins' attorney addressed to the CCC, the second was a copy of Attorney Jones' investigation report that had been released to the CCC and Treasurer on September 2. The demand letter claimed, among other things, that Petitioner "inappropriately

¹⁹ Attorney Spruce found no violation of CCC policy from O'Day's claims.

disclosed Mr. Collins private health information to the public[.]” In his demand, he referenced the enabling statute, G.L. c. 10, § 76, and stated that Petitioner’s conduct towards him was “gross misconduct” and “malfeasance” that was “sufficient to remove [Petitioner] from office[.]”

Treasurer Goldberg, Deputy Treasurer Kim, Petitioner and her counsel met virtually on September 11, 2023. Treasurer Goldberg did not inform Petitioner that she was considering removing Petitioner under G.L. c. 10, § 76(d). After this meeting, Deputy Treasurer Kim relayed to Petitioner’s counsel that Treasurer Goldberg demanded Petitioner’s resignation. Petitioner refused to resign. Treasurer Goldberg still did not inform Petitioner that she was considering removing her under G.L. c. 10, § 76(d).

The Suspension

Treasurer Goldberg suspended Chair O’Brien from her position as Chair of the CCC on September 14, 2023, with a one-page letter that did not state any grounds for the suspension, much less that any conduct violated G.L. c. 10, § 76(d). Treasurer Goldberg cut off Petitioner’s access to her CCC email, computer and calendar. In addition to the suspension itself, Treasurer Goldberg publicly released a statement that “serious allegations” had been lodged against Chair O’Brien -- by nothing less than a fellow Commissioner, and by staff members as well. She stated that as a result of these accusations it had been necessary for the CCC to retain an outside law firm to investigate, that the firm had “returned with a report,” and that this had led the Treasurer to suspend her. The suspension was widely publicized in print, radio, television and social media.²⁰

²⁰ <https://www.wgbh.org/news/politics/2023-09-28/mass-cannabis-commission-chair-sues-state-treasurer-over-suspension> (last accessed November 7, 2024); <https://www.wbur.org/news/2023/09/28/shannon-obrien-deb-goldberg-ccc-cannabis-commission-suspension> (last accessed November 7, 2023); https://www.bostonglobe.com/2023/09/28/metro/deborah-goldberg-shannon-obrien-suspension-cannabis-control-commission/?p1=BGSearch_Advanced_Results (last accessed November 7, 2024).

Petitioner Tries to Defend Herself

Petitioner sought to defend herself and receive her opportunity to be heard by Treasurer Goldberg. Treasurer Goldberg ignored the request. Petitioner then filed a Complaint for Injunctive Relief in Suffolk County Superior Court, Civil Action No. 2384CV02183 on September 28, 2023 (the “Superior Court Action”), seeking, among other relief, her opportunity to be heard. Almost three weeks after Petitioner was suspended, after Treasurer Goldberg had made her public statement, and after the lawsuit was filed, Treasurer Goldberg finally revealed the putative basis under G.L. c. 10, § 76 for Chair O’Brien’s suspension in an October 4 letter (the “October 4 Notice”) and set a hearing date for November 7, 2023.

Petitioner Seeks Relief in the Superior Court

After discussions over the structure of Petitioner’s opportunity to be heard and moving the original hearing date, Treasurer Goldberg submitted a “protocol” to Petitioner. It was patently unfair to Petitioner. In turn, Petitioner sought a temporary restraining order from the Superior Court to enjoin the December 5 hearing. The Superior Court (Squires-Lee, J.) agreed and enjoined the December 5 hearing for ten days pending a hearing on Petitioner’s request for a preliminary injunction. APP_000001-000008.²¹

After the temporary restraining order entered, the parties submitted additional briefing concerning due process protections for the hearing. Petitioner argued that she was entitled to a public hearing to clear her name. She also argued that due process called for the ability compel witnesses to the hearing and obtain discovery of relevant documents. She argued that Treasurer Goldberg’s bias and predetermination of Petitioner’s fate precluded her from deciding claims made by her friend Collins under the Due Process Clause of the 14th Amendment and Article 29

²¹ The court stated, among other things “a meaningful opportunity to be heard requires understanding the full extent of the allegations you face and their factual underpinnings. Being forced to defend yourself with partial information does not comport with due process.” APP_000004-000005.

of the Massachusetts' Declaration of Rights. Treasurer Goldberg opposed, claiming she could remain impartial and that Petitioner was not entitled to a public name-clearing hearing (despite acknowledging the reasons for her decision would be publicly released).

Treasurer Goldberg also submitted a second “protocol” in response to the temporary restraining order claiming it was modeled after Justice Greaney’s (as Single Justice) unpublished Memorandum and Order in *Levy, et al v. The Acting Governor of the Commonwealth, et al*, SJC-2001-0531, Docket No. 42 (December 19, 2001) (Greaney, J.). The Superior Court (Squires-Lee, J.) found that the Single Justice decisions provided “exceedingly persuasive guidance” for “the process to be afforded to a member of an... independent commission, before removal[.]” in this matter of “first impression[.]” APP_000010. The judge concluded that due process: did not require a public hearing, though the parties could agree on one; did not grant Petitioner compulsory attendance of witnesses; and does not require “the appointment of an independent factfinder” which was “not contemplated by [G.L. c. 76, § 10].” APP_000010-000011 (internal footnote omitted). It was further noted that “judicial review... pursuant to G.L. c. 249, § 4... is another opportunity for [Petitioner] to challenge the evidence or conclusions reached at the hearing.” APP_000006. She also stated that, “to the extent [Petitioner] is entitled to a name-clearing hearing, she will be afforded the due process outlined in [*Stetson v. Bd of Selectmen of Carlisle*, 369 Mass. 755, 765 n. 14 (1976)].” APP_000013-000014.

Petitioner then sought interlocutory review of the Superior Court’s decision pursuant to G.L. c. 231, § 118. The Single Justice (Hershfang, J.) denied Petitioner’s petition on February 6, 2024. APP_000026.

The Hearing Dates Are Set

The parties eventually agreed that Petitioner’s hearing would start on April 10, 2024. After an unforeseen delay, it started on May 2, 2024. Thomas Maffei, Esq. was appointed as the

Officiant as he also had been in the *Levy* case. His role was a “gatekeeper” to “ensure that the evidence proffered in this case is reliable and trustworthy and that the overall hearing is fair.”

APP_001567.

The hearing started with Treasurer Goldberg placing into the record all materials supporting her case, which was two investigator reports, certain documents from the investigators and the CCC, and youtube.com links to the public meetings. APP_000794-000796. Treasurer Goldberg was present, along with two attorneys from the Office of the Treasurer and her three outside counsel from Morgan Lewis & Bockius LLP. The CCC’s outside counsel and general counsel attended at various times. The Treasurer presided as finder of fact. The hearing was in private in the Treasurer’s conference room. Morgan Lewis & Bockius LLP prosecuted the case for Treasurer Goldberg. Treasurer Goldberg did not call any witnesses. Neither Collins nor Commissioner Camargo testified. The anonymous witnesses Attorney Jones interviewed were never identified.

Petitioner’s counsel cross-examined Attorney Jones and Attorney Spruce. Treasurer Goldberg’s counsel also examined them. Petitioner made an opening statement, APP_001309-001345, and then was examined by her counsel, APP_001345-001407; APP_001469-001470, and Treasurer Goldberg’s counsel. APP_001407-001469. Commissioner Kimberly Roy (“Commissioner Roy”) testified, APP_001471-APP_001518, but Treasurer Goldberg did not cross-examine her. Petitioner also submitted into the record sworn written testimony by Edward J. Farley. APP_000776-000783. Petitioner’s counsel made a closing argument. Treasurer Goldberg’s counsel did not.

Attorney Maffei made several rulings along the way. APP_000762-000714; APP_001175-001176; APP_001647-001648; APP_001563-1577; APP_001578-001583. Among

them, he excluded any evidence of the anonymous witnesses because they lacked reliability and trustworthiness. APP_001572-1577. He denied the Petitioner’s request for compulsory process or to require the Treasurer and her Deputy to testify. APP_001578-001583

The Removal Decision

On September 9, 2024, Treasurer Goldberg issued her Removal Decision. APP_001653-001733. The Removal Decision was served with a cover letter that the removal was effective September 10, 2024. APP_001653. The Removal Decision is eighty pages long. Treasurer Goldberg essentially found against Petitioner on everything. She did not find Petitioner credible or believe her evidence, instead choosing to deem Commissioner Camargo, Collins and the other complainants who did not testify, credible. Critically, she ignored the investigators’ testimony that there was no finding of intent behind Petitioner’s conduct.

IV. ARGUMENT

This case will be the first to consider both the grounds and the procedures for the removal of a Commissioner of the CCC by her appointing authority. The case raises important issues concerning both subjects.

A. General Principles Applicable to the Removal Proceeding

Since the power of an appointing authority to remove a Commissioner under G.L. c. 10, § 76(d) has never been previously construed, there are no cases which are exactly on point. Nevertheless, there are decisions in analogous situations and under different but similar statutes which shed light on the application of the CCC statute here.

First, an appointing authority has only limited power over an independent agency like the CCC. Massachusetts has sixteen such independent agencies,²² a central purpose of which is to allow such an organization to “operate[] more like a business than a government agency,” *Levy*,

²² See <https://www.mass.gov/topics/constitutionals-independents> (last accessed November 7, 2024).

436 at 748, and to be “free from the changing winds of politics.” *Id.* In *Levy*, the appointing authority lacked “broad supervisory or managerial responsibility power and control,” 436 at 746, no “power to manage,” “no broad power of oversight,” and “no supervisory, managerial, or proprietary interest.” 748-49. Therefore, in *Levy*, despite the fact that the G.L. c. 30, § 9 allowed removal for “cause,” the Court held that the “flexible definition of ‘cause’ that we apply in cases involving executive oversight of a governmental or corporate body is not appropriate where broad oversight is absent.” *Levy*, 436 at 749. Instead, it narrowed the available “cause” to be “in the order of malfeasance, misfeasance or willful neglect of duty.” *Id.* And, correspondingly, it held that that the standard of review was that of “substantial evidence” and not “arbitrary and capricious.” *Id.* It is “not a decision to which deference is accorded. Rather it is a decision that must be given very close scrutiny.” *Levy*, 436 at 746-48.

By contrast, six years later, the Court had occasion to consider the removal of the Chief Medical Examiner who worked under the direct control of the executive branch. *Flomenbaum v. Com.*, 451 Mass. 740 (2008). In that situation, the Court held, wide deference is to be granted to the executive’s discretion, such as his “honest judgment,” “conclusion that the interests of the public” require it, even the executive’s assessment that he had “less than complete confidence” in a public official’s “competency and efficiency.” *Flomenbaum*, 451 Mass. at 746-747. Accordingly, the Court held that in that case, the standard of review should be “arbitrary and capricious.”

Second, there is no doubt that the Petitioner’s hearing called for procedural due process as guaranteed by both the federal and state constitutions. The particular procedural rights are governed by the principles of *Matthews v. Eldridge*, 424 U.S. 319 (1976). G.L. c. 10, § 76(d) states that the “commissioner shall be provided with a written statement of the reason for

removal and an opportunity to be heard.” The statute, however, does not specify what constitutes an “opportunity to be heard.” Nevertheless, there can be no dispute that Petitioner, who, by statute, could not be removed from her statutory term absent a finding of one of the five criteria, and therefore she had a “property interest” which called for pre-hearing due process. *See Hall-Brewster v. Bos. Police Dep’t*, 96 Mass. App. Ct. 12, 20 (2019); *Bd. of Regents v. Roth*, 408 U.S. 564, 571, 576 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Moreover, since her suspension and removal, along with the corresponding public announcement of the action, constituted harm to her “liberty interest” in having any ability to seek further employment, she was also entitled to a post-removal “name-clearing” hearing. *Wojcik v. Massachusetts State Lottery Com’n*, 300 F.3d 92, 103 (1st Cir. 2002), *citing Bd. of Regents*, 408 U.S. at 573 (“[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to [her], notice and an opportunity to be heard are essential... In such a case, due process would accord an opportunity to refute the charge[s][.]”); and *Codd v. Velger*, 429 U.S. 624, 627–28 (1977). Since, she was never given the meaningful pre-suspension hearing to which she was entitled, ultimately the hearing she did get was a unique combination hearing to vindicate both her property (her job) and her liberty (reputational) harm.

What procedure that should govern the hearing depended on an application of the universally accepted criteria of *Matthews*, 424 U.S. at 333-334, to wit, a hearing “at a meaningful time and in a meaningful manner,” that is, a “flexible” due process which “calls for such procedural protections as the particular situations demands.”²³ In *Levy*, Justice Greaney specified

²³ In order to apply the meaningful time and manner standard, the Court laid down a set of three factors: “[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 334–35.

certain procedural requirements. These rulings dissatisfied the petitioners, but the full court never had to deal the due process issues since that removal decision was vacated. *Levy*, 436 Mass. at 752. In this case, where the procedures were premised on the same Justice Greaney procedures, this continues to be an open question.

B. Whether the Evidence Asserted as Grounds for Removal Satisfies the Criteria Under G.L. c. 10, § 76(d)

Treasurer Goldberg asserts there are two grounds for removal: (1) that Petitioner committed gross misconduct[;]" and (2) that she is "unable to discharge the powers and duties of the commissioner's office[.]" APP_001657. Petitioner submits that the facts were not properly found, and even taking them as true, fail to rise to the heightened grounds for removal.

1. Gross Misconduct

Treasurer Goldberg looked to *Hellman v. Board of Registration in Medicine*, 404 Mass. 800, 804 (1989) ("*Hellman*") for the definition of gross misconduct. She interpreted that "gross" means "flagrant" or "extreme" and "[o]ut of all measure, beyond allowance, not to be excused, flagrant; [or] shameful." Treasurer Goldberg speciously omitted the bolded phrase in *Hellman* analysis that "'[m]isconduct', in general, is improper conduct or wrong behavior, but as used in speech and **in law it implies that the conduct complained of was willed and intentional.**" *Hellman*, 404 Mass. at 804 (emphasis added). She instead focused on the phrase "[i]t is more than that conduct which comes about by reason of error of judgment or lack of diligence. It involves intentional wrongdoing or lack of concern for one's conduct." APP_001710. In this context, gross misconduct must be "willed" and "intentional." Ultimately, Treasurer Goldberg "interpret[ed] 'gross misconduct' in Section 76(d) to describe:

certain harmful conduct performed intentionally or recklessly, i.e., with disregard for the risk of, or lack of concern about, the consequences of one's actions. The harmful conduct must be flagrant, extreme, inexcusable, outrageous, and/or shameful, including (but not limited to) acts disregarding the safety or rights of others (e.g., the right to be free from unlawful

discrimination or harassment, or the right to exercise an entitlement to leave). Unless sufficiently severe, the conduct also typically involves repeated, rather than single or sporadic, actions.

APP_001711.

Whatever definition, it did not happen here. There is no evidence to support Treasurer Goldberg’s finding that Petitioner “intentionally and callously harm[ed] her colleagues, including Commissioner Camargo and Mr. Collins.” APP_001660. Both investigators found that none of Petitioner’s conduct was intentional. APP_000833-000834; APP_000866; APP_000872; APP_001081. To the extent the Treasurer found otherwise, it simply is speculation that is not based on anything other than her own dislike of Petitioner.²⁴

The two categories in which she has alleged gross misconduct are racial, ethnically and culturally insensitive conduct and Petitioner’s treatment of Collins. The specific conduct, failing to establish any gross misconduct, follows.

2. Racially, Ethnically and Culturally Insensitive Conduct

a. That Petitioner used the term “yellow”

The offense that Petitioner is said to have committed on this subject is that in an executive session, discussing her excitement about a recent conversation she had with an African-American developer, she repeated his words about bringing social equity opportunities to “black, brown and yellow” communities. This is the principal accusation upon which Treasurer Goldberg has rested her findings of racial insensitivity. APP_001674-1677.²⁵ Petitioner’s testimony on this was un rebutted. APP_001323; APP_001403.

²⁴ Separately, Treasurer Goldberg’s Removal Decision does not delineate all of Petitioner’s conduct that was “intentional” versus “reckless.”

²⁵ Attorney Jones’ report that claims an unnamed witness reported that Petitioner referred to a person of Asian heritage as “yellow” in a meeting in the fall of 2022 and further stated, “I guess you’re not allowed to say ‘yellow’ anymore[.]” Petitioner vehemently denied Attorney Jones’ account of her interview. Attorney Jones never produced her interview notes from this purported exchange, and it was a battle over who said what. Petitioner further testified to Treasurer Goldberg that “I never referred to an Asian individual as yellow... [I]ts not part of my

Commissioner Roy testified to Treasurer Goldberg, in reference to the meeting where this exchange happened, that Petitioner had a conversation with a local real estate developer:

how to impact marginalized communities, communities that were impacted by the war on drugs that had high rates of incarceration and arrests, and that weren't really -- we're less than 10 percent in our equity admission. We are failing at the commission. And Ms. O'Brien wanted to come up with ways to be more impactful. And she relayed the quote verbatim, and I could unequivocally say, she was not calling an Asian person, that she was referring to communities, communities of color. So, she identified three different communities, and how can we as a commission invest in these communities? How can we help them? How can we be more impactful? Because we are failing in our mission, where less than 10 percent ownership of equity.

APP_001504. Treasurer Goldberg ignored this, Commissioner Roy's testimony that there were no "racial undertones" to this exchange and that Petitioner was trying to promote social equity while at the CCC. APP_001505. Commissioner Roy was not interviewed by Attorney Jones about this, APP_001505, even though Petitioner asked Attorney Jones to interview Commissioner Roy.²⁶

Treasurer Goldberg, over the evidence to the contrary, found this rose to gross misconduct because it was "utterly unacceptable" and "outrageous coming from a leader of an organization charged with advancing the economic interest and opportunities of people of color, among targeted groups." APP_00101712. In any event, all that Petitioner did was to repeat a phrase spoken by a person of color, said without malice of any kind by either person, and only to communicate an utterly positive intention about social equity opportunities.

vocabulary. I repeated someone else's phrasing to share my excitement about the new ideas for the CCC social equity mission that I was charged with." APP_001323.

²⁶ Commissioner Roy also testified that this exchange occurred in the CCC's Executive Session in a meeting in the fall of 2022. APP_001503. The CCC's Executive Sessions have been preserved on video. The best evidence would be on the video and meeting minutes of this exchange, which still have not been released by the CCC for over a year. <https://www.youtube.com/@massccc/search?query=eXECUTIVE%20SESSION> (last accessed November 5, 2024).

b. That Petitioner referred to “these people” as “articulate”

Attorney Jones alleged during an interview with her that Petitioner said, “[m]any of **these people** who answer the phones may or may not be college grads, but they are **articulate**.”

(emphasis in the original). APP_000239. Attorney Jones never produced the notes of this exchange. Treasurer Goldberg found this supposed comment was “troubling” because Petitioner “implied surprise that someone with lesser education can speak articulately, which [Petitioner] knew or should have known is offensive.” APP_001684. Without attributing it to any racial, ethnic or cultural conduct in her findings, Treasurer Goldberg concluded this was part of her analysis that Petitioner’s “[r]acially, [e]thnically and [c]ulturally” “insensitive conduct” amounts to gross misconduct. APP_001713. Treasurer Goldberg is the one imputing race, ethnicity and cultural biases into this comment, not Petitioner.

In any event, Petitioner has no memory of it, and at the hearing Treasurer Goldberg did not ask either Petitioner or Attorney Jones about this. Petitioner had no notice that this was going to be a potential ground for removal as gross misconduct.

3. The Camargo complaints

Commissioner Camargo did not testify at the hearing. As stated earlier, Commissioner Camargo is one of Treasurer Goldberg’s appointing authorities. Her desire to have the Chair position, her relationship with Cedric Sinclair, and her motive to remove Petitioner is explored earlier. Commissioner Camargo was not subjected to cross-examination. Only Commissioner Camargo’s unsworn, written complaint to Attorney Jones and Attorney Jones’ summary of their interview was considered.

a. That Petitioner called Sinclair and Camargo “buddies”

Commissioner Camargo complained that Petitioner on various occasions said that Cedric Sinclair was Commissioner Camargo’s “buddy” and that they had a close professional

relationship. No evidence was submitted about the actual number of times this occurred.

Commissioner Camargo claimed that she told Petitioner to stop using the term “buddy” about her and Sinclair. Camargo alleged, and Attorney Jones agreed, that these statements were references to the fact that they are both persons of color. Treasurer Goldberg found that Petitioner’s use of “buddy” was “disrespectful, rude and condescending” as well as “unprofessional and inappropriate[.]” APP_001680. However, Treasurer Goldberg ultimately found “there is insufficient evidence... to find that racial animus drove” Petitioner “to continue to inappropriately refer to Commissioner Camargo and Mr. Sinclair as ‘buddies.’” APP_001680.

Later in the Removal Decision, Treasurer Goldberg finds this conduct was “harassing” of Commissioner Camargo because it was “repeated and intentional” and “in disregard of any harm it was causing Commissioner Camargo[.]” APP_001716. Treasurer Goldberg found this conduct was “contrary to the [CCC’s] Handbook” that the CCC is a “safe and collegial work environment based on mutual respect” and “free from discrimination or harassment.” APP_001716-001717. There was no evidence submitted that Petitioner’s conduct was intentional or to harass Commissioner Camargo. To the contrary, Attorney Jones testified, generally, that “I don’t know specifically what [Petitioner’s] intentions were.” APP_001081.

b. That Petitioner asked whether Lydia Edwards and Commissioner Camargo knew each other

Commissioner Camargo complained that Petitioner made a racially biased assumption that Commissioner Camargo and Senator Lydia Edwards “probably” knew one another. Petitioner testified that she thought it was reasonable that Commissioner Camargo and Senator Lydia Edwards had crossed paths at some point because they are activists and leaders in Boston, both reside in Boston, both worked on Democratic campaigns and were involved in cannabis policy and lawmaking and that there was no racial animus behind the comment. APP_001325-

001326. Attorney Jones did not even ask Petitioner about this comment. APP_001085. There need not be any bias at play for someone to surmise that Commissioner Camargo, a well-connected community organizer and activist, and a politically appointed public servant, would know Senator Edwards, a politician who resides in her city who “has spent her entire career as an advocate, activist, and as a voice on behalf of society’s most vulnerable”²⁷ who is also involved in the sponsor of cannabis related legislation.²⁸

Commissioner Camargo complained that Petitioner said that “I don’t know [State Senator] Lydia Edwards, but you probably know her.” Commissioner Camargo and Attorney Jones inferred from this that she made the comment only because they are both people of color and that Chair O’Brien “assum[es] all people of color know one another” and Commissioner Camargo never told Petitioner that she knew or had any affiliation with Senator Edwards. Treasurer Goldberg found that Petitioner made the comment “at least in part because of an assumption that Commissioner Camargo knew Senator Edwards because they are the same race” and was “at least in part, rooted in a race-based assumption.” APP_001678. To support her gross misconduct findings, Treasurer Goldberg called this “reckless and inexcusable” because “[t]he notion that all women of color in politics, or all successful women of color, in Boston must know one another is ludicrous.” APP_001713. Treasurer Goldberg further stated this behavior was “obtuse, outrageous, intolerable” “for the leader of a government agency that puts social equity, and advancing the economic interests of women and minorities, at the forefront of its mission.” *Id.*

²⁷ <https://www.boston.gov/departments/city-council/lydia-edwards> (last accessed November 5, 2024).

²⁸ Petitioner submitted evidence that Commissioner Camargo “followed” Senator Edwards on Twitter. Petitioner also submitted a video link where Petitioner testified to Senator Edwards with Commissioner Camargo are in attendance. This was all ignored by Treasurer Goldberg.

c. The “not qualified” comment

Commissioner Camargo complained that, in response to a question from a journalist as to why Petitioner felt the other candidates that applied for Chair (including Commissioner Camargo) were not appointed to be Chair instead, and in an unidentified governance meeting, Petitioner purportedly made “disparaging remarks” about Commissioner Camargo’s professional qualifications and how she was not qualified for the Chair position. Commissioner Camargo felt this “belittled” and “dehumanized” her. Attorney Jones found Commissioner Camargo’s feelings were “plausible[.]” APP_000236.

Treasurer Goldberg reviewed the video of the interview—available for anyone to see that shows no commentary that Commissioner Camargo was not qualified—and found that Petitioner “implied that the other candidates were not qualified for the Chair position.” APP_001681. Treasurer Goldberg found this was “inappropriate and unprofessional” but ultimately did not find Petitioner’s comments were “racially motivated.” *Id.* This is one of the few instances where Treasurer Goldberg had to concede there was not racially motivated conduct. However, her generalized opinion Petitioner’s conduct overall was “inappropriate” and “unprofessional” and thus gross misconduct is her attempt to meld the findings favorable to Petitioner with her unsupported removal findings. It is impossible to determine what is actually at issue.

4. The Collins Complaints

Attorney Spruce’s found Petitioner committed “discrete” violations of the CCC’s internal policies, APP_000255, rejected virtually all of the claims by Collins, and outright rejected O’Day’s claim. Collins’ complaints follow:

a. That Petitioner interfered with Collins’ parental leave rights

Collins claimed that Petitioner interfered with his parental leave rights by contacting him “repeatedly” during his first parental leave, making critical comments about his parental leave,

and connecting his continued employment with his leave decisions. APP_000256. Attorney Spruce found that Petitioner did not interfere with Collins' first leave. Neither did she find that Petitioner deprived him of leave at any other time or deprive him of any benefits that he was entitled overall, or threatened to do so, or that she connected any leave decisions with Collins' employment. APP_000256-000258.

The only "discrete" policy violation she found was that it was "possible" – without actually finding this occurred – that Petitioner said Collins was "MIA" and the CCC was "rudderless" during his parental leave thus, Collins lacked the "assurance[]" that he could exercise" his parental leave rights. APP_000257-000258. There was no finding Petitioner actually did anything to deny or threaten his rights. It was only Collins' subjective belief that she did. He took all the leave that he was entitled to, and then resigned just as he said he would. She never did a single thing to threaten his right to take leave. The only thing Spruce found is that he lacked the "assurance" he could exercise all parental leave rights. There was no misconduct here.

Treasurer Goldberg found there was gross misconduct because Collins was "deprived of the assurance that he could avail himself of his leave rights" under the CCC's Handbook, thus Petitioner "therefore interfere[ed] with those rights." APP_001714. Treasurer Goldberg claims Petitioner's interference was done "intentionally" or "recklessly" without specifying what acts were what. She claimed the actions were "flagrant" and "shameful" and "exposed the Commission to potential legal liability[.]" APP_001715. The record lacks any evidence of this. Collins never testified to Treasurer Goldberg. Attorney Spruce did not find Petitioner's actions were intentional.

b. That Petitioner bullied him on July 28

Spruce further found that Petitioner's announcement of Collins parental leave plans and future resignation at the July 28 meeting was "especially severe" and "egregious" because of the

“content” and “public setting.” APP_000264. She also stated that Petitioner “effectively extinguished” Collins chance to “define the terms on which he left the” CCC and “set off a media firestorm” Collins feels he cannot recover from. APP_000264. This deprivation of Collins right to a “graceful exit” from the CCC that “he built” was bullying in her opinion under the CCC’s handbook. APP_000264.

Collins served at the pleasure of the Commissioners. G.L. c. 10, § 76(j). He reported directly to the Chair. He is an at-will employee. Petitioner has a statutory duty to “exercise supervision and control over all the affairs of the commission.” G.L. c. 10, § 76(h). She had every right to attempt to correct his inadequacies, and if he could not, then he would be terminated. Much less did he have the right to “define the terms” of his departure, nor decide when the announcement would be made. Nor was he entitled to complain about the lack of a “graceful exit” when he chose to leave in the most ungraceful manner imaginable. In no way could this even resemble “gross misconduct” or anything like it. He had told multiple people that he was going to leave at the end of 2023, so this had been his plan all along.

c. That her collective acts created a hostile work environment for Collins.

Overall, Attorney Spruce found that Petitioner bullied²⁹ Collins, and that created a hostile work environment³⁰ from a conglomeration of various things: yelling at Collins one time; telling Collins that she had a “blunt instrument” and he could be terminated if his performance did not

²⁹ She relied on a Massachusetts bill regarding workplace bullying—**that was never enacted**—and a California statute that had a “malice requirement. APP_000260. It belies logic for Attorney Spruce to inject a definition rejected by the Legislature into a workplace policy and rely on another state’s inapplicable definition. Even worse, her guidance required “malice” and “intent to cause pain or distress” to Collins. None of this was proved. Attorney Spruce did not make any finding of Petitioner’s intent, and even noted that Petitioner was “under pressure” due to impending regulatory deadlines, the vacant high-level positions at the CCC, the media’s critique of the CCC, and how Collins “had been talking about resigning for many months without making a firm plan and would be absent during his extended parental leave in the fall.”

³⁰ Collins claimed this led to him consider resigning, Spruce found that was not true.

improve; that she spoke with concerned legislators about his shortcomings as a manager (they reached out to her); she referred to his parental leave as a “personal issue” when discussing his succession planning; publicly announcing that he was taking ten weeks of leave and then resigning and that her “jaw had dropped” when he told this; that she reported at the Commission’s public meeting that the agency was “in crisis” and made other statements with similar non-significance. All of the findings were either inconsequential or a normal part of the employment relationship, and not gross misconduct. The conclusion that any of these acts could alone, or in combination, be seen as misconduct, much less meet the heightened gross standard, is unfounded and distorted.

5. Inability to Discharge Duties

Treasurer Goldberg incorrectly interpreted the provision of G.L. c. 10, § 76(d)(3). She interpreted this to mean a commissioner can be removed if the appointing authority(ies) deem the commissioner “incapable, unfit, or lacking in ability to perform competently the powers and duties of a CCC commissioner.” The phrase “unable to discharge the powers and duties of the commissioner's office” should be analyzed in parallel with the 25th Amendment to the United States Constitution, Section 3 and Section 4 when the President of the United States “is unable to discharge the powers and duties of his office[.]” This phrase “unable to discharge the powers and duties of... office”—in the 25th Amendment context—has been interpreted to arise in “presidential and vice-presidential vacancies and presidential disability[.]”³¹ Obviously the CCC provision, as with the 25th Amendment, applies to some physical or disability, not a violation of a handbook.

³¹ <https://constitutioncenter.org/the-constitution/amendments/amendment-xxv/interpretations/159> (last accessed November 1, 2024).

However, Treasurer Goldberg’s interpretation that she is the sole arbiter to determine whether Petitioner is unable to discharge the powers and duties as Chair and Commissioner based on “discrete” handbook violations is inconsistent with the law set in *Levy*. Treasurer Goldberg concluded that Petitioner “is unable to discharge the powers and duties of the commissioner's office” because Treasurer Goldberg found Petitioner did not comply with the CCC’s employee handbook, Manager Code of Conduct and CCC’s Code of Ethics. Treasurer Goldberg also found that Petitioner was “unable to discharge her duties” because she found Petitioner did not advance the CCC’s social equity mission because the finding that she engaged in racially, ethnically and culturally insensitive conduct was “antithetical” to the CCC’s mission. Ultimately, Treasurer Goldberg concluded that Petitioner failed to satisfy her “duty to be a leader” and removed her under G.L. c. 10, § 76(d)(3).

Treasurer Goldberg’s finding is also inconsistent with *Levy* and the intent of *Levy* to preclude appointing authorities from overseeing independent agencies. Treasurer Goldberg’s interpretation sets the precedent that anytime an appointing authority thinks the appointee is not a “good leader” they then can be removed for being “unable to discharge” their duties.

C. The Hearing Procedures Were Inadequate and Did Not Afford Petitioner Her Due Process Protections

There were a number of important procedural issues that arose from the way that the hearing was conducted.

1. Whether the Treasurer was Required to Recuse Herself as Factfinder

The Treasurer insisted that she simultaneously take on the roles of “presenter of the charges, the initiator of the hearing, the finder of fact, and the ultimate judge on whether the evidence supports removal under the statute[.]” APP_001582. First, Petitioner objected that Treasurer Goldberg was too close to Collins, the chief complainant. As Officiant Maffei observed, “[o]ne could easily infer, based on the relationships between Collins and the Deputy

Treasurer, that they are favorably inclined toward their friend and former colleague, Collins, and that they were not happy with the notion that the Chair might ask him to resign.” APP_001582. Indeed, according to former Chair Hoffman, Treasurer Goldberg had been instrumental in installing Collins in the job of Executive Director at the very inception of the Commission. APP_001593. Collins was her eyes and ears at the Commission.

Article 29 declares the “right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit” and requires “rigid adherence to that principle is essential to the maintenance of free institutions.” *Com. v. Leventhal*, 364 Mass. 718, 721 (1974). Judge Squires-Lee declined to disqualify Treasurer Goldberg as the finder of fact because she found that Petitioner had not proved actual bias. However, actual bias was not required, as “even the appearance of partiality must be avoided.” *See Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013) (internal citations omitted); *see also Doe v. Sex Offender Registry Bd.*, 84 Mass. App. Ct. 537, 541 (2013) (Article 29 “extends beyond judges ‘to all persons authorized to decide the rights of litigants,’” which includes administrative hearing officers.). Treasurer Goldberg should have recused herself based on the appearance of bias alone, but she refused.

Secondly, apart from her relationship to Collins, Petitioner objected that she should not have been allowed to take on the multiple roles. *See Williams v. Pennsylvania*, 579 U.S. 1, at *8, *14 (2016) (homicide case in which prosecutor later acted as the judge). Treasurer Goldberg was personally involved in the underlying events involving the status and treatment of both Collins and Commissioner Camargo. Her involvement in those situations meant that she had information relevant to the management and machinations of the players inside of the divisive CCC. This was problematic both because she had her own view of the facts and because she used her

position as fact-finder to avoid, and to have her Deputy avoid having to produce testimony or other relevant evidence critical to Petitioner's defense.

Petitioner also objected that even during the hearing, the Treasurer exploited her multiple roles, switching between prosecutor and judge at the very same time as the hearing proceeded. During breaks, Treasurer Goldberg left the room to confer with her prosecuting attorneys *to tell them what questions should be asked on cross-examination*. APP_001111-001112. When counsel objected, her counsel candidly disclosed on the record that this was true. Moreover, during the hearing it emerged that prior to the hearing Treasurer Goldberg's counsel prepared the investigators for their testimony. APP_000800-000801; APP_001000-001001.

2. Burden of Proof

Treasurer Goldberg had the burden of proof. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 49, 126 S. Ct. 528, 530, 163 L. Ed. 2d 387 (2005) ("burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief"); *see also Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 275, 114 S. Ct. 2251, 2256, 129 L. Ed. 2d 221 (1994) (*citing Webre Steib Co. v. Commissioner*, 324 U.S. 164, 171 (1945)). Treasurer Goldberg, the accuser and initiator of charges, took the position "there is no 'burden of proof' that the Treasurer must satisfy." This is an absurd contention, totally in conflict with any concept of due process of law, and a basis to reverse the Treasurer's decision. Thus, under the rules the Treasurer created, the Chair had to guess about which alleged acts referred to in 45 pages of reports might be those on which the ultimate findings may rest. Petitioner then had prove a negative – that she is guiltless of everything that might be alleged.

Officiant Maffei opined that "[i]n the usual case, the burden is on the party seeking relief" (the Treasurer), APP_00168, though he declined to issue a ruling opining that this was a

legal decision that he was not authorized to make. *Levy* held that the standard for removal is substantial evidence; if so, then the appointing authority necessarily bears the burden of proof. 436 Mass. at 748. Basic fairness calls for the Treasurer to prove the facts that she contends are sufficient grounds for removal under G.L. c. 10, § 76. Treasurer Goldberg’s disbelief of Petitioner’s submitted evidence “is not the equivalent of affirmative evidence to the contrary.” *See Boston v. Santosuosso*, 307 Mass. 302, 349 (1940).

3. Whether the Petitioner was Entitled to Compulsory Process Under G.L. c. 30A, or to Other Means of Production of Evidence.

Petitioner argued to the Officiant that G.L. c. 30A applied to the hearing and she should receive compulsory process or other mechanisms to obtain evidence. Treasurer Goldberg objected, declaring she was not an “agency” as defined in the statute,³² and argued G.L. c. 30A does not apply because there is no reference to the statute in G.L. c. 10, § 76. The Officiant agreed with Treasurer Goldberg.

This error prejudiced Petitioner. If a substantive statute has its own procedure, a court looks to that. But when it does not have its own, then the court must apply the criteria found in 30A, §1, that is, whether “legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.” This case was undeniably an “adjudicatory proceeding.” Both §76(d) and the federal and state constitutional due process provisions require a hearing to determine the “legal rights, duties and privileges” of Shannon O’Brien, a “specific person.”³³

³² An “agency” under G.L. c. 30A is defined as “any department, board, commission, division or authority of the state government or subdivision of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings[.]” G.L. c. 30A, § 1(2) (emphasis added). We have dealt with the Treasurer’s authority to adjudicate above. She also has authority to enact regulations, a power she has not hesitated to use. *See* 960 CMR 2.00; 960 CMR 3.00; 960 CMR 4.00; 960 CMR 5.00; 960 CMR 6.00; 960 CMR 7.00.

³³ In *Rinaldi v. State Bldg. Code Appeals Bd.*, 56 Mass. App. Ct. 668, 673 (2002), the Appeals Court found that even though there was no express reference to G.L. c. 30A in the statute governing the merits of the dispute,

The Treasurer's argument was that this would complicate a removal hearing in which the three appointing authorities were all involved since G.L. c. 30A excludes the Governor and the Attorney General. But the Legislature did not exclude the Treasurer. So it clearly applies to this case.

4. Whether Petitioner was Entitled to a Public Hearing

This proceeding was supposed to be a “name-clearing hearing,” that is, an opportunity for Petitioner to rehabilitate her public reputation after Treasurer Goldberg announced the vague reasons for her suspension. But the only way to accomplish it was to allow the public to know exactly what the evidence was. Where “the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name is through publicity.” *Gunasekera v. Irwin*, 551 F.2d 461, 470 (6th Cir. 2009). “A name-clearing hearing with no public component would not address this harm[.]” *Id.*; see also *Patterson v. City of Utica*, 370 F.3d 322, 337 (2004) (“Requiring the City to address such a risk by offering plaintiff the opportunity to publicly refute the charges made against him... does not place an undue burden upon the government’s interest.”).

Instead, the Treasurer presided over a secret proceeding, followed by an 80-page diatribe composed virtually entirely of one-sided, hyperbolic language characterized by endless, repetitive adjectives (over 700) such as “outrageous” “flagrant” “extreme” “inexcusable” and “inappropriate[.]” She then informed the media of her decision, without releasing her Removal Decision, and only gave her reasons that Petitioner committed “gross misconduct[.]

since it enabled a board to “hear testimony and take evidence” and “issue a decision” the Appeals Court concluded that “the board has the express statutory power to conduct adjudicatory hearings, and thus is an agency as defined in G.L. c. 30A, with its procedures in this regard governed thereby.” (internal citations omitted). See also *Milligan v. Bd. of Registration in Pharmacy*, 348 Mass. 491, 495508 (1965) (“[i]f such a hearing is constitutionally necessary (see Fifth and Fourteenth Amendments of the Constitution of the United States, and the Constitution of Massachusetts, Declaration of Rights, arts. 1, 10 and 12), the proceeding is adjudicatory.”) (emphasis added).

“demonstrated she is unable to discharge the powers and duties” and “I expect my appointee’s actions to be reflective of the important mission of the CCC and performed in a manner that incorporates the standards of professionalism required in today’s work environment[.]”³⁴

V. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, this Court should vacate the Removal Decision and:

1. Reserve and report this matter to the Full Court;
2. In the alternative, Petitioner requests that the case be taken up by the Single Justice and that such Justice order the production of the complete record of the proceedings now in the custody of the Treasurer, and then set a briefing schedule and a hearing date; and
3. Thereafter, reinstate Petitioner as the Chair of the Cannabis Control Commissioner;
and
4. Grant such other and further relief as is just and equitable.

³⁴ <https://www.bostonglobe.com/2024/09/09/metro/deborah-goldberg-shannon-obrien-cannabis-control-commission/> (last accessed November 7, 2024).

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Dated: November 7, 2024

CERTIFICATE OF SERVICE

I, William E. Gildea, hereby certify that on November 7, 2024, I caused the foregoing document to be served via email on Defendant's counsel:

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