

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

SHANNON O'BRIEN, Chair of the
Massachusetts Cannabis Control
Commission,

Plaintiff,

v.

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

Defendant.

Civil Action No. 2384CV02183

**CHAIR SHANNON O'BRIEN'S MEMORANDUM OF LAW IN
SUPPORT OF HER MOTIONS FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

i. Introduction

Plaintiff Shannon O'Brien ("Chair O'Brien") (also the former Treasurer of the Commonwealth) was summarily suspended from her position as Chair of the Cannabis Control Commission ("CCC") on September 14 by the current Treasurer, Deborah Goldberg ("Treasurer Goldberg") and banished from the premises – without receiving either the prior written statement of reasons or the hearing required by law. After Plaintiff sued and sought an injunction, Treasurer Goldberg finally sent a letter containing two sets of charges. The accusations are (1) that Chair O'Brien has made racially insensitive comments and (2) that she has mistreated the Commission's (now former) Executive Director in various ways, all purportedly constituting "gross misconduct."

Treasurer Goldberg also eventually agreed to a hearing. She now proposes to have that hearing—which she refers to as a “meeting”—on Tuesday December 5, in secret; denying Chair O’Brien time to prepare and even though one of the investigation reports is not yet in; lacking in the most basic of fair procedures -- to the extent of naming herself as the finder of fact, despite her own involvement in the relevant events and her pre-judgment of guilt. Chair O’Brien has strongly objected to the schedule and the decision to have the hearing in private. Under the circumstances the only likely outcome, unless relief is granted by this Court, is that she will not only lose her job, but will go down in history as the former Treasurer and Commissioner who was fired for making racist statements. And she will probably never work again.

As developed below, none of the accusations have any merit. Chair O’Brien should at least have a fair chance of showing that. The instant motions seek a restraining order to postpone the December hearing until a time at which the Court can hear our motion for preliminary injunction which, in turn, seeks an order which secures Plaintiff’s right to a fair hearing as required by statute and by due process of law.

ii. Relevant Factual Background

Almost three weeks after Treasurer Goldberg suspended Chair O’Brien, well after she had made a public statement,¹ and after being sued, the Treasurer finally revealed her reasons in an October 4 letter (the “October 4 Notice”).² *Affidavit of Chair Shannon O’Brien*, ¶ 34. The reasons given were two-fold: (1) that Chair O’Brien had made statements that “are perceived to

¹ Treasurer Goldberg announced that “serious allegations” had been lodged against Chair O’Brien -- by no less than a fellow Commissioner, and by staff members as well. She stated that as a result of these accusations it had been necessary 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 the plaintiff. The suspension was widely publicized in print, radio, television and social media.

² A true and accurate copy is attached to the *Affidavit of Chair Shannon O’Brien, Exhibit 1*.

be race-based or, at a minimum, to be racially, ethnically, and culturally insensitive” (the “Racial Insensitivity charges”); and (2) that she had mistreated Shawn Collins, the Executive Director of the Commission on various occasions (the “Collins charges”). *Affidavit of Shannon O’Brien, Exhibit 1.*

The Racial Insensitivity charges were based upon an investigation initiated by the CCC, and conducted by an outside lawyer (“Investigator 1”) and then turned over to the Treasurer (and perhaps others). *Id.* The Collins charges were based upon complaints made by Collins, which were then made part of a second investigation conducted by a different outside attorney (“Investigator 2”). *Id.* The October 4 Notice stated that the Treasurer would need to “await the conclusions of the second independent investigator regarding these allegations to decide whether reasons exist warranting your removal” and a hearing date was set for November 7. *Affidavit of Chair Shannon O’Brien, Exhibit 1.*

On October 25, the attorneys for both sides met to discuss a date for the hearing and how the hearing would be conducted, but no agreement was reached. Everyone agreed to extend the hearing date, in part, because the second investigator’s report was not ready and that the holidays were upcoming. *Affidavit of William E. Gildea, ¶ 3.* Plaintiff’s attorneys had previously presented a list of requested procedures for the hearing to the Treasurer’s counsel. *Id., ¶ 2.* On November 1, the parties agreed upon December 5 as a “target hearing date” but the Treasurer was not yet ready to propose how the hearing would unfold. *Id., ¶ 6.* Moreover, the second investigation was not yet complete and Treasurer’s counsel advised that the date was dependent on receipt of Investigator 2’s report in time. *Id.* Treasurer Goldberg’s attorney pointed out on November 1 that the date could also be put off if Plaintiff needed more time to prepare. *Id.*³

³ A true and accurate copy of the email exchange is attached to the *Affidavit of William E. Gildea, Exhibit 1.* The relevant email states in full:

On Friday, November 17, Investigator 2 informed counsel for Plaintiff that her fact investigation was “coming to an end point”; that she had not yet been requested by the CCC to prepare a report and would check on the status that day. *Affidavit of William E. Gildea*, ¶ 8. Investigator 2 said that she was aware of the December 5 hearing date and that they should be able to produce the report before the hearing date. *Id.*, ¶ 8. Later that same day, at 5:20 pm, the Treasurer’s counsel provided Chair O’Brien’s with a long-awaited “protocol” about how the hearing would be conducted. *Affidavit of William E. Gildea, Exhibit 2*.

Virtually all of Plaintiff’s requests were rejected, such as the appointment of an impartial fact finder, specific notice of the charges, and identification of all witnesses, among other things, and a set of deadlines for Plaintiff to provide advance notice of her case and all evidence were announced, with a compliance date in five business days. *See Affidavit of William E. Gildea, Exhibit 2*. The “protocol” appoints Thomas Maffei as an “officiant” but leaves Treasurer Goldberg as the fact finder; permits Chair O’Brien to cross-examine the investigators (though neither would be actually be present on December 5); allows Chair O’Brien to present witnesses, but it does not provide a mechanism for her to secure their attendance; and only allots Chair O’Brien four hours. *Id.*

Then on Wednesday, the day before Thanksgiving, the Treasurer delivered a letter to Plaintiff (the “November 22 Notice”)⁴ informing Chair O’Brien that she had decided not to wait

As we both acknowledged when we met last week, in order, among other things, to allow your client time to prepare for the opportunity to be heard that is to happen before any removal, circumstances may impact the date. These include the timing of the conclusion of the investigation, and issuance of a report, by the investigator engaged by the CCC to investigate issues raised by its executive director and, if necessary, the Treasurer’s issuance of an updated statement of reasons for removal. Subject to our understanding that the date could change, the Treasurer is available for the meeting on December 5 at 1:00.

⁴ A true and accurate copy is attached to the *Affidavit of Chair Shannon O’Brien, Exhibit 2*.

for Investigator 2's report. Instead, Treasurer Goldberg had decided to sever the Collins charges from the hearing. The December 5 hearing would concentrate only on the Racial Insensitivity charges, and the Collins matter would be heard at some other unspecified time. However, in the same letter, Treasurer Goldberg informed the Plaintiff that Investigator 1, who had developed the race-based allegations, would likewise not attend the December 5 hearing but only be available at a later unknown date. *Id.* Thus neither of the two investigators would be appearing that day, and Chair O'Brien would have to testify before they do. On November 29, Todd & Weld requested that the Treasurer's counsel postpone the December 5 hearing because the second investigator's report had not been issued, the first investigator would not be present on December 5, the "protocol" is not fair and did not allow Chair O'Brien or my office adequate time to prepare. *Id.*, ¶ 18. The Treasurer's counsel informed Todd & Weld that they did not have authority to postpone the December 5 hearing date. *Id.*, ¶ 19. Chair O'Brien cannot be ready for a hearing on December 5 and cannot comply with the sudden and unreasonable deadlines that the Treasurer announced ten business days before December 5.

Nevertheless, the Treasurer has rejected the Plaintiff's request to postpone the hearing, casting aside her previously expressed respect for the Plaintiff's right to prepare. The new changes are also at odds with Treasurer Goldberg's impatience, as far back as the end of July, to force Chair O'Brien out solely based upon her alleged mistreatment of Collins. Indeed, until a few days ago she was insisting that she would not go forward without Investigator 2's report, however long it took. Also puzzling is that fact, despite our multiple queries, counsel for the Treasurer and the Commission each professes not to know when the report is expected. *Affidavit of William E. Gildea*, ¶ 9. The Treasurer's counsel has declined to ask for Investigator 2's report; and counsel for the CCC has forbidden Chair O'Brien's attorneys to ask Investigator 2 directly when her report

will be issued. Chair O'Brien believes that the second investigation was going well for her and would provide exculpatory information to her, and that the only plausible explanation for the convoluted new schedule is to achieve a strategic advantage over Chair O'Brien.

iii. Argument

A. *Applicable Law*

1. Due Process – Protected Interests

Chair O'Brien had the right to due process of law in respect to her removal as Chair under two theories, which protect separate but intertwined interests. First, a person faced with a loss of their job enjoys the procedural protections of due process law under both the 14th Amendment to the United States Constitution and Article 10 of the Massachusetts Declaration of Rights if she has a "property interest" in that position. A property interest exists if the person has an expectation of continued employment by a public employer unless and until the employee has failed to satisfy a condition of the employment, as where a contract or statute specifies that she cannot be terminated without "just cause." *See Hall-Brewster v. Bos. Police Dep't*, 96 Mass. App. Ct. 12, 20 (2019) ("[a] just cause standard creates a property interest in continued employment in cases where a public employee has been discharged."); *Bd. of Regents v. Roth*, 408 U.S. 564, 571, 576 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Here, per statute, Chair O'Brien has a continued expectation to serve her five-year term as Chair until 2027 unless she is removed by Treasurer Goldberg for one of the five reasons in the enabling statute and only after providing Chair O'Brien a written statement for the reasons of removal and after an opportunity to be heard.

Plaintiff also enjoys the protection of due process because she has a "liberty interest" at stake. This is because her suspension, especially as it was accompanied by suggestive and

harmful public justifications by the Treasurer, has already caused significant harm to her reputation. If then sustained by the Treasurer in a hearing lacking in realistic fairness guarantees, it will not only result in the loss of her job, but would ensure that she will never get another one. This is often referred to as “stigma-plus.” *Rodriguez de Quinonez*, 596 F.2d 486, 489 (1st Cir. 1979). Given the devastating and permanent consequences of removal in these circumstances, she is also entitled to due process in a “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).

2. M.G.L. ch. 10, §76 Does Not Give Treasurer Goldberg As Much Authority As She Asserts

M.G.L. ch. 10, § 76 is the CCC’s enabling statute and sets forth the powers and duties of appointing authorities, the Chair, commissioners and the Executive Director. The statute—in the context of removing a Chair or Commissioner—has never been interpreted by a court in the Commonwealth. Per statute, the CCC is an independent state agency. While the Treasurer, Attorney General and the Governor have certain appointment and removal powers, there is no statutory directive in M.G.L. ch. 10, § 76 that allows them any daily oversight over the CCC. Treasurer Goldberg herself has publicly conceded “the Treasurer has no other authority, oversight, management, or influence over the [CCC].”⁵

⁵ <https://www.wgbh.org/news/politics/2023-09-28/mass-cannabis-commission-chair-sues-state-treasurer-over-suspension> (last accessed November 30, 2023) (“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.”).

The Legislature intentionally did not cede all authority over the CCC to the Treasurer as it did for the Massachusetts Lottery Commission.⁶ The legislative history of M.G.L. ch. 10, § 76 indicates that the legislature originally intended the CCC to be organized as follows:

(a) There shall be a commission known as the cannabis control commission to have general supervision and sole regulatory authority over the conduct of the business of marijuana establishments as defined in chapter 94G of the General Laws. **The commission shall consist of 1 commissioner and 2 associate commissioners who shall be appointed by the treasurer.** Not more than 2 members of the commission shall be of the same political party. The commissioner shall serve a term coterminous with the treasurer. The associate commissioners shall serve a term of 4 years. Any vacancy occurring for any reason other than the expiration of a term shall be filled for the unexpired term in the same manner as the original appointment.

(b) The treasurer shall appoint commissioners based on their experience or expertise in public health, law enforcement, social justice, the regulation and business of consumer commodities and the production and distribution of marijuana and marijuana products.

(c) The commissioner shall serve as chair and shall preside over all official activities of the commission

(d) The treasurer may remove any member for neglect of duty, misconduct or malfeasance in office, after providing the member with a written statement of the charges and an opportunity to be heard.

Exhibit 1. The current version of M.G.L. ch. 10, § 76 that was officially enacted is markedly different, most notably adding two additional commissioners who are not appointed by the Treasurer, and only permits the Treasurer to appoint two out of five total commissioners instead of originally three out of three total commissioners. The new version of the statute gave appointment powers to the Governor and Attorney General, and took away complete appointment and removal control from the Treasurer. *Exhibit 2.* Notably, section d of M.G.L. ch.

⁶ See M.G.L. ch. 10, § 23 (“There shall be, in the office of the state treasurer, a state lottery commission, hereinafter called the commission, consisting of the state treasurer, the secretary of public safety or his designee, the state comptroller or his designee, and two persons to be appointed by the governor for terms coterminous with that of the governor... The state treasurer shall be the chairman of the commission.”).

10, § 76 was amended and narrowed in 2017 to include five (5) specified reasons for a commissioner’s removal and that they would be provided, before removal, “with a written statement of the reason for removal” as opposed to the language that stated “a written statement of the charges” must be provided. *Exhibit 2*.

Under M.G.L. ch. 10, § 76, other than appointment and removal powers, the Treasurer has no authority over the day-to-day operations of the CCC.⁷ Unlike other agencies, the CCC’s Chair does not serve at the pleasure of the appointing constitutional officer. The Treasurer’s powers under M.G.L. ch. 10, § 76 are unusually narrow and come only with the five-year appointment and removal powers. The Treasurer’s removal powers are only ripe after providing the commissioner with “a written statement of the reason for removal and an opportunity to be heard” and only if the Treasurer can prove a very limited set of specific criteria, in this case if the Chair commits gross misconduct or inability (as in mental or physical disability) to fulfill the duties of office.

In contrast to “just cause” and “good cause” standards found in other statutes leave much to the discretion of the employer.⁸ Importantly, Chair O’Brien is protected by far more vigorous requirements since, under M.G.L. ch. 10, § 76, a commissioner cannot be removed within her

⁷ <https://www.wgbh.org/news/politics/2023-09-28/mass-cannabis-commission-chair-sues-state-treasurer-over-suspension> (last accessed November 30, 2023) (“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.”).

⁸ *See Sch. Comm. of Foxborough v. Koski*, 8 Mass. App. Ct. 870, 870 (1979) (“Good cause includes any ground which is put forward by the committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee’s task of building up and maintaining an efficient school system.”) (internal citations omitted); *Goldhor v. Hampshire Coll.*, 25 Mass. App. Ct. 716, 723 (1988) (“just cause”... mean[s] ‘[T]here existed (1) a reasonable basis for employer dissatisfaction with a[n] ... employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge *reasonably related, in the employer’s honest judgment, to the needs of his business.*” (emphasis in original) (internal citations omitted).

five year term unless the Treasurer proves one of five specific criteria. In this case, based upon the Treasurer's October 4 Notice, the Treasurer must prove Chair O'Brien (1) "committed gross misconduct in office" or (2) is "unable to discharge the powers and duties of the office," i.e. a disability or illness that prevents her from doing her job.

3. Matthews v. Eldridge

For the last half-century, the case of *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) has been the universally accepted source for the formula to determine what process must be adopted in a given situation to protect an individual from the immediate and/or long-term consequences of a meritless or ill-motivated accusation. In *Matthews*, the Court held that the overriding principle is that a person who is protected by due process is entitled to a hearing "at a meaningful time and in a meaningful manner." 424 U.S. at 333 (internal citations omitted). That standard was deliberately fashioned to be flexible. Its underlying premise is that there is no black letter rule defining which procedures are right for every situation.

[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

Mathews, 424 U.S. at 334 (internal citations omitted).

The Supreme Court's conclusion was that in order to determine what the attributes of due process should be in a particular case one must make an analysis of the interests of both the accused person and the government, in light of all the circumstances. To that end, the Supreme Court laid down a set of three factors to consider: "[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.

Applying the Matthews Analysis

This case is unique in various respects. And those unique aspects call for procedures which are truly fair, reliable and realistic. That is because it is essential that all parties who have a stake in this young industry and its regulation—the government, the Commission’s public servants, the licensees and the customers—may have confidence the Commission is being run with fairness, integrity, honesty and transparency and without government overreach by governmental authorities who have limited statutory authority.

Most procedural due process cases involve either a property interest or a liberty interest. These can follow different routes. In a singular property interest case, where the employee has a legal expectation of continued employment, the employee stands to save or lose his job. In that situation, due process typically requires a “limited” pre-deprivation hearing *before* the axe falls, which “should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Loudermill*, 470 U.S. at 545-546. This “limited hearing” is then “to be followed by a more comprehensive post-termination hearing.” *Gilbert v. Homar*, 520 U.S. 924, 929 (1997).

A liberty interest case typically involves an employee who is “at will;” thus has no property interest and therefore can assert only the liberty-based right to clear his name. Such an interest, by itself, can only support restoration of the employee’s name, but not the job itself. Accordingly, in most cases, the name-clearing hearing comes after the deprivation. *See*

Limerick v. Greenwald, 666 F.2d 733, 735 (1st Cir. 1981) (“due process would require a post-deprivation proceeding at which the plaintiffs could clear their names.”); *see also Quinn v. Shirey*, 293 F.3d 315, 320 (6th Cir.2002) (“It is the denial of the name-clearing hearing that causes the deprivation of the liberty interest without due process.”)

The Treasurer proposes to make a “final determination”⁹ (albeit one now to be litigated in segments, according to the most recent plan) – an unusual hybrid hearing in which both property and liberty interests are at stake and in which the procedures followed are utilized to assess both pre and post-deprivations. This places the parties at a decisive crossroad where whatever path is taken will likely be incapable of being unwound. Plaintiff’s reputation has already been damaged,¹⁰ and in need of “name cleaning” before she has had any process at all. However, if she is vindicated at a realistically fair hearing, the past injury to her name could be repaired. On the other hand, if the proceeding ends with an announcement by the Treasurer that Chair O’Brien was fired for making made racist comments, her career will be done despite her innocence of the charges against her. Likewise, as to Chair O’Brien’s property interest in her job, if the hearing goes her way, the suspension will be lifted and she will be restored to office. But if the finding is adverse, someone else will be appointed to take her place for the remainder of her term and she will undoubtedly never work again as the leader of a similar government organization.

⁹ *See Affidavit of Chair Shannon O’Brien, Exhibit 1* (“In advance of that meeting, I will notify you of any reasons additional to, or different from, those identified below that I will consider in making a final determination regarding whether to remove you from your position.”).

¹⁰ Treasurer Goldberg announced that “serious allegations” had been lodged against Chair O’Brien -- by no less than a fellow Commissioner, and by staff members as well. Treasurer Goldberg stated that as a result of these accusations it had been necessary 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 Chair O’Brien. The suspension was widely publicized in print, radio, television and social media. <https://www.wgbh.org/news/politics/2023-09-28/mass-cannabis-commission-chair-sues-state-treasurer-over-suspension> (last accessed November 28, 2023); <https://www.wbur.org/news/2023/09/28/shannon-obrien-deb-goldberg-ccc-cannabis-commission-suspension> (last accessed November 28, 2023); https://www.bostonglobe.com/2023/09/28/metro/deborah-goldberg-shannon-obrien-suspension-cannabis-control-commission/?p1=BGSearch_Advanced_Results (last accessed November 28, 2023).

Everything depends upon the fairness of the upcoming administrative proceeding. Unfortunately, however, what the Treasurer plans to hold is a hearing which lacks the most critical of procedural protections. Nevertheless, because this controversy happens to have arrived at a crucial inflection point, this Court is in the position to issue equitable relief which defines the basic contours of what a fair procedure should be in the circumstances presented here. In so doing, the Court can prevent devastating harm before it happens.

B. The Components of Meaningful Due Process Here

1. Chair O'Brien Must Be Provided A Meaningful Time and Opportunity to Prepare

The requirement of a meaningful time arises in various ways. Plaintiff needs time to prepare – a necessity the Treasurer previously conceded.¹¹ Chair O'Brien received the "protocol" ten business days before the hearing. *Affidavit of William E. Gildea*, ¶ 11. The "protocol" was sent at 5:20 pm on a Friday before the holiday week, and set unrealistic deadlines, namely provide all of Chair O'Brien's evidence to the Treasurer seven days prior to the hearing. *Affidavit of William E. Gildea*, ¶¶ 11. Essentially, the Treasurer gave Chair O'Brien five business days (with the Thanksgiving holiday in the middle) to prepare her entire case.

The hearing as proposed is also not meaningful because Treasurer Goldberg is only allotting Chair O'Brien four hours to be heard. Other than Chair O'Brien, there are a significant amount of witnesses that need to be called (even though the "protocol" does not offer any way to secure witnesses) and cannot possibly be completed in four hours. The cross-examination of the first investigator alone could take four hours, as her "investigation" apparently took six months to complete and she conducted numerous interviews.

¹¹ See *Affidavit of William E. Gildea, Exhibit 1*.

Moreover, the proposed hearing is not fair because the Treasurer has not complied with her own “protocol[.]” She has not identified any witnesses the Treasurer in fact intends to rely upon, and has not provided Chair O’Brien a full list of the documents the Treasurer intends to rely upon.¹²

Further, it is unfair to hold the hearing without either of the investigators present. The Treasurer has indicated that the first investigator is out of the country on December 5 and will be called at a later date, after, of course, having the benefit of reviewing all of the evidence. The second investigator has apparently not completed her report and would not be present on December 5. There is no reason to bifurcate the hearing as proposed. The Treasurer should wait until the second investigator has completed her report, Chair O’Brien has had ample time to review it. If the hearing proceeds as the Treasurer intends, it will not be orderly, will cause more expense to all parties, and will interfere with Chair O’Brien’s right to be heard in a meaningful way and in a meaningful manner.

¹² The “protocol” states in part:

- The Treasurer:
 - May be represented by counsel.
 - May consider information in writing or presented orally, including without limitation, by written witness statements, investigatory reports, or in person oral statements or testimony provided at the meeting.
 - Shall notify the Chair at least one week before the meeting of any documents on which the Treasurer bases in whole or in part any of the reasons set forth in any updated statement of reasons for continuing suspension with pay and potential removal and of any witnesses scheduled to testify or to make written or in person oral statements and, if the Chair so requests, the witness(es) identified by the Treasurer shall appear and be subject to cross-examination at the meeting.
 - May examine or cross-examine, either herself or by her counsel, any witness who appears at the meeting, and ask and have answered written questions of any witness who presents a written statement or who testifies to the Treasurer.

2. Specific Notice of the Charges

Specific notice requires the Treasurer to set forth the precise acts or statements that she contends constituted “gross misconduct.” Notice must also disclose the identity of every person whose statement is to be relied upon to prove the alleged misconduct. Likewise, the specific notice must state the particular event(s) or other basis upon which the Treasurer contends that Chair O’Brien is “unable” to uphold the requirements of her position. *See Stetson v. Bd. of Selectmen of Carlisle*, 369 Mass. 755, 765, (1976); *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 377 (1985); *Hall-Brewster*, 96 Mass. App. Ct. at 23. *See also McKenney v. Comm’n on Jud. Conduct*, 377 Mass. 790, 801 (1979) (“General references to alleged misconduct and references to particular but unidentifiable, events will not suffice.”). If the Treasurer is unable to produce the information in timely fashion on the current schedule, the date of the hearing should be extended.

A fundamental aspect of procedural due process is specific notice of what is being alleged and the substance of what evidence the employer intends to introduce. Without this, the Plaintiff cannot defend herself. As the SJC has held, in a constitutionally required name clearing hearing “[s]he should have notice of specific charges, an opportunity to present witnesses, and, barring special considerations, an opportunity to cross-examine those who charge [her] with any wrongdoing.” *Stetson*, 369 Mass. at 765 n. 14 (1976) (emphasis added); *Langlitz*, 396 Mass. at 377 (1985); *Hall-Brewster*, 96 Mass. App. Ct. at 23; *McKenney*, 377 Mass. at 801. Chair O’Brien is entitled to an explanation “of the substance of the [Treasurer’s] evidence against [her] so that [s]he can present [her] side of the story.” *Cotnoir v. Univ. of Maine Sys.*, 35 F.3d 6, 12 (1st Cir. 1994), citing *Loudermill*, 470 U.S. at 546; *see also Hall-Brewster*, 96

Mass. App. Ct. at 23; *Fontana v. Comm'r of Metro. Dist. Comm'n*, 34 Mass. App. Ct. 63, 69 (1993).

The Treasurer's October 4 Notice purports to rely on the report of Investigator 1 and some information she has received from other sources. But the only charges contained in the letter lack the requisite specificity to comply with due process. The October 4 Notice itself does not constitute anything close to specific notice. The report is filled with generalizations and outright opinions of the investigator and others which are in no way "sufficient for persons whose rights may be affected to understand the substance and nature of the grounds upon which they are called to answer." *Langlitz, supra*; *McKenney v. Comm'n, supra*. The report is almost entirely based upon statements of anonymous witnesses. And a number of the statements are simply reported without even an indication of whether the investigator credited or rejected them; much less is it possible to discern which complaints recounted in the report were credited by the Treasurer and are asserted against Chair O'Brien here. Chair O'Brien is entitled to a full explanation "of the substance of the [Treasurer's] evidence against [her] so that [s]he can present [her] side of the story." *Cotnoir*, 35 F.3d at 12, *citing Loudermill*, 470 U.S. at 546; *see also Hall-Brewster, supra* at 23; *Fontana v.*, 34 Mass. App. Ct. at 69.¹³

In her most recent communication, of November 22, the Treasurer stated that the hearing will "focus *primarily* on matters addressed in the first investigation, *including but not limited to* the aspects of the investigation discussed beginning on page one through the third full paragraph of page three of my October 4, 2023 letter to you." (emphasis added). *Affidavit of Chair Shannon O'Brien, Exhibit 2*. This is wholly insufficient. It must be made clear that the Treasurer may not

¹³ Treasurer Goldberg has not sufficiently alleged how Chair O'Brien conceivably "is unable to discharge the powers and duties of the commissioner's office" either physically or cognitively.

rely upon claims that are not specifically identified. Similarly, the Treasurer may not rely on anonymous witnesses. Determining the truth of accusations against Chair O'Brien here is highly dependent on an ability of to assess a witness' credibility, accuracy, memory, and ability to interpret what is said and what is meant.

Chair O'Brien has the right to test the reliability of the witnesses who gave evidence against her, but unless she knows who they are, that right is illusory.¹⁴ Likewise, the Treasurer should not be allowed to rely on generalized statements, such as those taken from Investigator 1's report, referring to what "all the witnesses," said, or what "multiple credible witness statements" reported," or that some unidentified group had a "shared consensus," and so forth. Sweeping statements such as these are especially problematic practice in light of the fact that Investigator 1's report reveals that she interviewed anonymous staff members as a group.¹⁵ That practice alone constituted a flagrant violation of one of the most basic principles of competent investigation, and relying on same to remove Chair O'Brien is beyond all bounds.

3. The Charges

In the November 22 Notice, Treasurer Goldberg stated that the hearing would focus only on so much of the allegations which are found in a certain portion of the original October 4 document, that is, "beginning on page one through the third full paragraph of page three of my October 4, 2023 letter to you." *Affidavit of Chair Shannon O'Brien, Exhibit 1*. **There is no evidence of any physical or cognitive disability.** What follows are the only four charges

¹⁴ All employees have the right to be heard regarding their concerns in the proper forum. However, hiding their identities but relying on their purported statements is patently unfair. Employees are protected from any retaliation—which has not occurred here—under M.G.L. ch. 151B and M.G.L. ch. 149, § 185.

¹⁵ For example, Investigator 1 referred to "[a] meeting attendee recalled . . .;" and "[a] meeting attendee noted. . . ."

mentioned or referred to in which arguably could serve as specific notice. We will describe the allegations here, but return to them further below to provide the context.

(a) The “yellow” person comment

The section containing the enumerated pages in the October 4 letter, actually presents only a single specific example of racially insensitive comment. The statement in question purports to be from an account given by one of the unidentified witnesses. The Notice states:

As just one example, in response to the allegation that in a meeting in the fall of 2022 you remarked, in reference to a person of Asian heritage, “I guess you’re not allowed to say ‘yellow’ anymore,” you did not deny doing so. You said, “I should have cleaned it up. It’s difficult sometimes to know how to say the right thing.”

(b) The Camargo complaints

Although not contained in the October 4 Notice itself, Investigator 1’s report to which it refers does contain complaints of purported racial insensitivity by fellow Commissioner Nurys Camargo (“Commissioner Camargo”). She was the first to make such accusations against Chair O’Brien and the one, Chair O’Brien believes, who recruited the anonymous staff members to vent against Chair O’Brien in Investigator 1’s group meeting. According to Investigator 1’s report, Commissioner Camargo filed a formal complaint “that Chair O’Brien engaged in conduct that made [her] ‘personally and professionally uncomfortable, due to Chair Shannon O’Brien’s . . . comments, behavior, false narratives – and at times, statements made that I believe have racial motives and biases.’” She provided four examples of what she characterized as race-based comments, three of which were credited by Investigator 1. These three were as follows:

(i) The “buddy” comment

Commissioner Camargo complained that Chair O’Brien on various occasions said that Cedric Sinclair was Commissioner Camargo’s “buddy” and that they had a close professional relationship.

(ii) The Lydia Edwards comment

Commissioner Camargo complained that Chair O’Brien said that “I don’t know [State Senator] Lydia Edwards, but you probably know her.” She 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.”

(iii) The “not qualified” comment.

Commissioner Camargo complained that in response to a question from a journalist as to why Chair O’Brien felt the other candidates that applied for Chair (including Commissioner Camargo) were not appointed to Chair, Chair O’Brien purportedly replied with a statement that Commissioner Camargo was not qualified for the role.

4. Chair O’Brien’s Responses to the False Charges

Importantly, even a cursory look at the factual issues to be decided at the hearing makes crystal clear the *Matthews* principles call for a hearing which is a genuine search for truth. As will be seen, Chair O’Brien has a wholly exculpatory answer to each of the four allegations at issue and that the procedures sought are necessitated by each of the three *Matthews* factors:

(a) The “yellow” person comment

Amazingly, the report of this accusation fails to mention that these were the words of someone else. Chair O’Brien was relaying a conversation that she had with a well-known and respected African-American real estate developer, in which he was explaining how he organized

a group of “black, brown and yellow” investors to create business opportunities for persons of color. Chair O’Brien acknowledged to Investigator 1 that she repeated what he had said, and acknowledged to Investigator 1 that she should have not have used the real estate developer’s exact words despite the fact that there was no pernicious bias or intent on the part of either one.

(b) The “buddy” comment

Commissioner Camargo and Sinclair were buddies in fact. They were “comrades in arms” in their war against Chair O’Brien. In any event there was no racial dimension to this comment whatsoever.

(c) The Lydia Edwards statement

Senator Edwards and Commissioner Camargo are both women of color who are government officials in the Boston area. There is nothing that is racially insensitive about thinking that they might know each other politically and professionally. Nor would there need there 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 many prominent persons of color in the community.

(d) The “not qualified” comment

A major complaint of Commissioner Camargo was that when Chair O’Brien was asked by a blogger/journalist “why [Chair O’Brien] felt that other candidates who applied for Chair (including Commissioner Camargo and others) were not qualified, Chair O’Brien “made disparaging remarks about my professional qualifications,” which then led Investigator 1 to conclude that “[i]t is, therefore, plausible that Commissioner Camargo, as did the journalist above, perceive Chair O’Brien as stating that Commissioner Camargo was not qualified for the role of CCC Chair.”

In fact, Chair O'Brien did not say anything about her colleagues' qualifications. It was **Treasurer Goldberg** who did. *Affidavit of Shannon O'Brien*, ¶¶ 2-8. Chair O'Brien made no such statement at all. *Id.*, ¶ 3. She actually evaded the journalist's question because she did not wish to embarrass either the Treasurer or the other candidates. *Id.*, ¶¶ 7-8. Moreover, she had nothing to do with their applications and she did not believe it was her business to make public statements about whether her colleagues were qualified. *Id.* Instead, she responded only by saying what Treasurer Goldberg told her as to why **she** was chosen (to wit, that she fit all three statutory criteria) and not why Treasurer Goldberg did not choose others. *Id.* What's more, Investigator 1's conclusion is only a finding that it was "plausible" that **Commissioner Camargo** "perceived" Chair O'Brien as stating that Commissioner Camargo was not qualified for the role of CCC chair." However, Commissioner Camargo's misinterpretation is in no way an offense committed by Chair O'Brien.

5. Chair O'Brien Is Entitled to an Opportunity to Be Heard Before an Unbiased Fact Finder

Beyond doubt the most important question in the case is whether there will be a fact finder who has not already committed herself to removing Chair O'Brien from office. The core of due process is a finder of fact who is able to make unbiased determinations. A "decisionmaker [who is] so utterly biased as to deprive an employee of" the ability to "correct errors of fact on which the termination decision is based." *See Chmielinski v. Massachusetts*, 513 F.3d 309, 318 (1st Cir. 2008). A hearing with facts "found" in that way would certainly "be deemed a hollow exercise[.]" *See Lawless v. Town of Freetown*, 63 F.4th 61, 69 (1st Cir. 2023), *citing Chmielinski*, F.3d at 318.

By any measure, Treasurer Goldberg is anything but unbiased. To be sure, she has the statutory power to decide whether to remove an appointee – but only if warranted by facts which

establish one of the specific criteria. However, if the words “due process” have any real meaning, her personal involvement in events in question, her irredeemable commitment to the ouster of Chair O’Brien, her manipulation of the schedule and the procedures for the required hearing, she cannot be left to decide what the facts are.

Undeniably, and well before she suspended Chair O’Brien, Treasurer Goldberg was deeply committed to Chair O’Brien’s removal and immersed in the plan to make it happen, factually based or not. *See Affidavit of Chair Shannon O’Brien*, ¶ 27-33.¹⁶ Moreover, by acting so precipitately as to miss the obvious rules of the statute and then publicly justify doing it to the detriment of Chair O’Brien’s reputation, she has brought enormous pressure on herself to continue defending her intemperate step. Moreover, Treasurer Goldberg herself is part of the story and needs to be a witness, for reasons we discuss below in connection with one of the accusations against Chair O’Brien.

6. Chair O’Brien Can Choose to Have a Public Hearing

Chair O’Brien is entitled to a public, name-clearing hearing. *See Gunasekera v. Irwin*, 551 F.3d 461, 470–71 (6th Cir. 2009) (“[t]he Second Circuit has held that an unpublicized, internal name-clearing hearing was insufficient because of the “substantial risk that the stigma against plaintiff would remain after such hearing.”) (applying *Matthews* factors) (*citing Patterson v. City of Utica*, 370 F.3d 322, 337 (2nd Cir. 2004)). Treasurer Goldberg herself has conceded the need for transparency surrounding Chair O’Brien’s suspension and potential

¹⁶ As Chair O’Brien’s affidavit sets forth, the principal driver of Treasurer Goldberg’s campaign to discharge her was the Treasurer and Deputy Treasurer’s support of Collins. Treasurer Goldberg and her deputy, Sarah Kim, had disagreed with Chair O’Brien’s management of the CCC and, in particular, with the Chair’s expressed intention to remove the Executive Director, Shawn Collins, a long-time colleague and valued friend of the two of them. *See Affidavit of Chair Shannon O’Brien*, ¶ 27-33

Chair O’Brien believes that if she is allowed to obtain the report of Investigator 2, it will show that Collins’ allegations against her were not factually based at all.

removal when she shared the following with Boston 25 News.¹⁷ Apparently transparency is only for the accuser. Now that it is Chair O'Brien's turn to defend herself, transparency is abandoned.

7. Chair O'Brien Must Be Afforded a Meaningful Opportunity to Secure and Cross-Examine Witnesses

Chair O'Brien has the right to call and cross-examine witnesses. She cannot do so under the current protocol because she has no means of securing any witnesses for the hearing. *See Stetson v. Bd. of Selectmen of Carlisle, supra; Beitzell v. Jeffrey*, 643 F.2d 870, 879 (1981) (process due included right to present and cross-examine witnesses); *Thomas v. Town of Salisbury*, 134 F.Supp. 3d 649 9 (D. Mass. 2015) (same). *See also New England Surv. Sys., Inc. v. Dep't of Indus. Accidents*, 89 Mass. App. Ct. 631, 640 (2016). Further, Treasurer Goldberg intends to rely upon a report that made findings based on unidentified witnesses.

8. Treasurer Goldberg, Not Chair O'Brien, Has the Burden of Proof

The protocol also appears to claim that Chair O'Brien has the burden of proof to disprove Treasurer Goldberg's allegations which is unfair to Chair O'Brien and contrary to law. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 49 (2005) ("burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief"); *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 275 (1994), *citing Webre Steib Co. v. Commissioner*, 324 U.S. 164, 171 (1945) ("claimant bears a

¹⁷ Treasurer Goldberg has publicly stated:

I have refrained from commenting on the suspension of Shannon O'Brien...Given reasonable and increasing demands for information and transparency, it is clear to me that it is necessary to share more information publicly... Several serious allegations were made by a Commissioner and CCC staff about the Chair's behavior and the CCC initiated an investigation.

<https://www.boston25news.com/news/local/mass-treasurer-breaks-silence-decision-suspend-chair-cannabis-control-commission/GXONZYXVOFC5NKSABFKW5ONXO4/> (last accessed November 30, 2023).

‘burden of going forward with evidence ... as well as the burden of proof’”). It is patently unfair that Treasurer Goldberg has charged Chair O’Brien with these allegations and now shifts the burden to her to disprove them without giving her realistic means to secure witnesses let alone know who all the witnesses against her actually are.

9. Chair O’Brien Must Be Provided With Potentially Exculpatory Evidence.

Investigator 2 has evidence (their report when complete) that is very likely to contain exculpatory evidence to Chair O’Brien, and she is entitled to receive that ahead of any hearing. Precluding Chair O’Brien from having this evidence prior to her name-clearing hearing deprives her of the whole point of the hearing, to clear her name. This report likely would do so, and it is telling that it has not been completed after all of this time. All Treasurer Goldberg needs to do is wait for Investigator’s 2 report. Then the parties can proceed.

10. Chair O’Brien’s Due Process and Statutory Rights Require a Hearing That Comports With the Particular Exigencies of this Set of Facts That is Far More Robust Than What Treasurer Goldberg Offers

Application of the three *Matthews* factors requires adoption of the various procedures set forth here. This is clearly shown by an analysis of the various interests bearing upon the need for an unbiased finder of facts. First, the concept that impartial finder of facts would serve the interest of the Plaintiff is not debatable. But, second, so too would it avoid the risk of an erroneous deprivation and enhance the ability to achieve an accurate and reliable result. Some of the charges discussed above are clearly not true. Others involve matters of interpretation or of supposition or opinion as to what Chair O’Brien thinks and speculation about what may underlay the words she chose. None of the charges can be said to be so well proven that there is no danger that a biased decision-maker, after a secret hearing, simply uses her rubber stamp and announces that Chair O’Brien has been removed for making racist comments. Putting the determination of facts in her hands alone would be reckless.

Third, there is no countervailing interest of the government. In fact, the Treasurer has already brought in a neutral—an independent attorney—to act as an “officiant” (whatever that entails) without any substantive role. There is no reason Treasurer Goldberg could not turn to that person to act as the finder of fact. Chair O’Brien would agree to it, and a result could be achieved which satisfies the concerns of all stakeholder for an honest and just outcome, i.e., to be the finder of fact instead of some kind of traffic director. In sum, Chair O’Brien is entitled to an impartial finder of fact. *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). This is a “core” element of due process. Wright & Miller, 32 Fed. Practice and Procedure, §8139 (2023).

Finally, a similar analysis applied to the other procedures requested by Plaintiff results in a similar result – each factor upholds the legitimate interests of Chair O’Brien, enhances reliability and reduces the risk of mistake and devastating harm, and infringes upon no legitimate interest of the Treasurer of the CCC. Other public agencies, boards, and commissions turn to a neutral finder for the acts, even the ultimate decision-maker may be the highest level of the organization.

In sum, the current “protocol” for the hearing does not come close to the due process rights owed to Chair O’Brien, and Chair O’Brien is entitled to a hearing that complies with her due process and statutory rights.

iv. Conclusion

For the reasons set forth above, Chair O’Brien respectfully requests the Court provide the following relief:

1. Issue a temporary restraining order prohibiting the Defendant from holding the hearing now scheduled for December 5, 2023 until the Court can hear the Plaintiff's motion for preliminary injunction;
2. Issue a short order of notice for a hearing before this court on the motion for preliminary injunction;
3. Thereafter, issue preliminary and permanent injunctions prohibiting the Defendant from holding a hearing regarding removal or removing the Plaintiff from office unless she complies with procedures to be outlined by the Court; and
4. Grant such other relief as is necessary, appropriate, equitable, or just.

Respectfully submitted,
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Dated: December 1, 2023

CERTIFICATE OF SERVICE

I, William E. Gildea, hereby certify that on December 1, 2023, I caused the foregoing document to be served via email on Defendant's counsel:

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EXHIBIT

1

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)

Chapter 10. Department of the State Treasurer ([Refs & Annos](#))

This section has been updated. Click [here](#) for the updated version.

M.G.L.A. 10 § 76

§ 76. Cannabis Control Commission; members; appointment; terms; chairman; secretary

Effective: December 15, 2016 to July 27, 2017

Cannabis Control Commission; members; appointment; terms; chairman; secretary

(a) There shall be a commission known as the cannabis control commission to have general supervision and sole regulatory authority over the conduct of the business of marijuana establishments as defined in chapter 94G of the General Laws. The commission shall consist of 1 commissioner and 2 associate commissioners who shall be appointed by the treasurer. Not more than 2 members of the commission shall be of the same political party. The commissioner shall serve a term co-terminous with the treasurer. The associate commissioners shall serve a term of 4 years. Any vacancy occurring for any reason other than the expiration of a term shall be filled for the unexpired term in the same manner as the original appointment.

(b) The treasurer shall appoint commissioners based on their experience or expertise in public health, law enforcement, social justice, the regulation and business of consumer commodities and the production and distribution of marijuana and marijuana products.

(c) The commissioner shall serve as chair and shall preside over all official activities of the commission.

(d) The treasurer may remove any member for neglect of duty, misconduct or malfeasance in office, after providing the member with a written statement of the charges and an opportunity to be heard.

(e) Two members shall constitute a quorum for conducting the business of the commission. A vacancy shall not impair the right of the remaining members to exercise the powers of the commission.

(f) The commission may expend for such investigators and clerical and other assistants as may be necessary for the performance of its duties. The commissioner may appoint a chief investigator and other investigators, who shall be exempt from chapter 31 of the General Laws, to enforce or cause to be enforced the penalties provided by law against a marijuana establishment that violates chapter 94G of the General Laws and shall make all necessary and appropriate investigations for that enforcement.

(g) All records of the commission shall be considered public records within the meaning of chapter 66 of the General Laws.

Credits

Added by St.2016, c. 334, § 3, eff. Dec. 15, 2016.

M.G.L.A. 10 § 76, MA ST 10 § 76

Current through Chapter 25 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

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EXHIBIT

2

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)

Chapter 10. Department of the State Treasurer (Refs & Annos)

M.G.L.A. 10 § 76

§ 76. Cannabis control commission; members; appointment; terms;
removal; quorum; salary; officers; code of ethics; operation as state agency

Effective: July 28, 2017

[Currentness](#)

(a) There shall be a Massachusetts cannabis control commission which shall consist of 5 commissioners: 1 of whom shall be appointed by the governor and shall have a background in public health, mental health, substance use or toxicology; 1 of whom shall be appointed by the attorney general and shall have a background in public safety; 1 of whom shall be appointed by the treasurer and receiver-general and shall have experience in corporate management, finance or securities; and 2 of whom shall be appointed by a majority vote of the governor, attorney general and treasurer and receiver-general, 1 of whom shall have professional experience in oversight or industry management, including commodities, production or distribution in a regulated industry and 1 of whom shall have a background in legal, policy or social justice issues related to a regulated industry. The treasurer and receiver-general shall designate the chair of the commission. The chair shall serve in that capacity throughout the term of appointment and until a successor shall be appointed. Prior to appointment to the commission, a background investigation shall be conducted into the financial stability, integrity and responsibility of a candidate, including the candidate's reputation for good character, and honesty. No person who has been convicted of a felony shall be eligible to serve on the commission.

(b) Each commissioner shall be a resident of the commonwealth within 90 days of appointment and, while serving on the commission, shall not: (i) hold, or be a candidate for, federal, state or local elected office; (ii) hold an appointed office in a federal, state or local government; or (iii) serve as an official in a political party. Not more than 3 commissioners shall be from the same political party.

(c) Each commissioner shall serve for a term of 5 years or until a successor is appointed and shall be eligible for reappointment; provided, however, that no commissioner shall serve more than 10 years. A person appointed to fill a vacancy in the office of a commissioner shall be appointed in a like manner and shall serve for only the unexpired term of that commissioner.

(d) The treasurer and receiver-general, the governor or the attorney general may remove a commissioner who was appointed by that appointing authority 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. Before removal, the commissioner shall be provided with a written statement of the reason for removal and an opportunity to be heard.

(e) Three commissioners shall constitute a quorum and the affirmative vote of 3 commissioners shall be required for an action of the commission. The chair or 3 members of the commission may call a meeting; provided, however, that notice of all meetings shall be given to each commissioner and to other persons who request such notice. The commission shall adopt regulations establishing procedures, which may include electronic communications, by which a request to receive notice shall be made and the method by which timely notice may be given.

(f) Commissioners shall receive salaries not greater than $\frac{3}{4}$ of the salary of the secretary of administration and finance under [section 4 of chapter 7](#); provided, however, that the chair shall receive a salary equal to the salary of the secretary of administration and finance. Commissioners shall devote their full time and attention to the duties of their office.

(g) The commission shall annually elect 1 of its members to serve as secretary and 1 of its members to serve as treasurer. The secretary shall keep a record of the proceedings of the commission and shall be the custodian and keeper of the records of all books, documents and papers filed by the commission and of its minute book. The secretary shall cause copies to be made of all minutes and other records and documents of the commission and shall certify that such copies are true copies and all persons dealing with the commission may rely upon such certification.

(h) The chair shall have and exercise supervision and control over all the affairs of the commission. The chair shall preside at all hearings at which the chair is present and shall designate a commissioner to act as chair in the chair's absence. To promote efficiency in administration, the chair shall make such division or re-division of the work of the commission among the commissioners as the chair deems expedient.

(i) The commissioners shall, if so directed by the chair, participate in the hearing and decision of any matter before the commission; provided, however, that at least 2 commissioners shall participate in the hearing and decision of matters other than those of formal or administrative character coming before the commission; and provided further, that any such matter may be heard, examined and investigated by an employee of the commission designated and assigned by the chair, with the concurrence of 1 other commissioner. Such employee shall make a report in writing relative to the hearing, examination and investigation of every such matter to the commission for its decision. For the purposes of hearing, examining and investigating any such matter, such employee shall have all of the powers conferred upon a commissioner by this section. For each hearing, the concurrence of a majority of the commissioners participating in the decision shall be necessary.

(j) The commission shall appoint an executive director. The executive director shall serve at the pleasure of the commission, shall receive such salary as may be determined by the commission, and shall devote full time and attention to the duties of the office. The executive director shall be a person with skill and experience in management, shall be the executive and administrative head of the commission and shall be responsible for administering and enforcing the law relative to the commission and to each administrative unit thereof. The executive director shall appoint and employ a chief financial and accounting officer and may, subject to the approval of the commission, employ other employees, consultants, agents and advisors, including legal counsel, and shall attend meetings of the commission. The chief financial and accounting officer of the commission shall be in charge of its funds, books of account and accounting records. No funds shall be transferred by the commission without the approval of the commission and the signatures of the chief financial and accounting officer and the treasurer of the commission. In the case of an absence or vacancy in the office of the executive director or in the case of disability as determined by the commission, the commission may designate an acting executive director to serve as executive director until the vacancy is filled or the absence or disability ceases. The acting executive director shall have all of the powers and duties of the executive director and shall have similar qualifications as the executive director.

(k) Chapters 268A and 268B shall apply to the commissioners and to employees of the commission; provided, however, that the commission shall establish a code of ethics for all members and employees that shall be more restrictive than said chapters 268A and 268B. A copy of the code shall be filed with the state ethics commission. The code shall include provisions reasonably necessary to carry out the purposes of this section and any other laws subject to the jurisdiction of the commission including, but not limited to: (i) prohibiting the receipt of gifts by commissioners and employees from any marijuana licensee, applicant, close associate, affiliate or other person or entity subject to the jurisdiction of the commission; (ii) prohibiting the participation by commissioners and employees in a particular matter as defined in section 1 of said chapter 268A that affects the financial interest of a relative within the third degree of consanguinity or a person with whom such commissioner or employee has a significant relationship as defined in the code; and (iii) providing for recusal of a commissioner in a licensing decision due to a potential conflict of interest.

(l) The Massachusetts cannabis control commission shall be a commission for the purposes of [section 3 of chapter 12](#).

(m) The commission shall, for the purposes of compliance with state finance law, operate as a state agency as defined in [section 1 of chapter 29](#) and shall be subject to the laws applicable to agencies under the control of the governor; provided, however, that the comptroller may identify any additional instructions or actions necessary for the department to manage fiscal operations in the state accounting system and meet statewide and other governmental accounting and audit standards. The commission shall properly classify the commission's operating and capital expenditures, and shall not include any salaries of employees in the commission's capital expenditures. Unless otherwise exempted by law or the applicable central service agency, the commission shall participate in any other available commonwealth central services including, but not limited to, the state payroll system pursuant to section 31 of said chapter 29, and may purchase other goods and services provided by state agencies in accordance with comptroller provisions. The comptroller may chargeback the commission for the transition and ongoing costs for participation in the state accounting and payroll systems and may retain and expend such costs without further appropriation for the purposes of this section. The commission shall be subject to section 5D and subsection (f) of section 6B of said chapter 29.

Credits

Added by [St.2016, c. 334, § 3, eff. Dec. 15, 2016](#). Amended by [St.2017, c. 55, § 1, eff. July 28, 2017](#).

M.G.L.A. 10 § 76, MA ST 10 § 76

Current through Chapter 25 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.