NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV02183

SHANNON O'BRIEN[1]

v.

DEBORAH GOLDBERG[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANT'S MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Concluding that Plaintiff, Shannon O'Brien (O'Brien or Chair), Chair of the Cannabis Control Commission (Commission) should not be compelled to participate in a hearing about her potential removal without adequate notice of the reasons and the evidence supporting those reasons or without sufficient time to prepare, I issued a temporary restraining order (TRO) on December 5, 2023 staying the upcoming hearing. Defendant, Deborah Goldberg (Goldberg or Treasurer), thereafter issued a revised protocol for the Treasurer's hearing providing additional time, process, and protections to the Chair.

I held a hearing on O'Brien's Motion for Preliminary Injunction on December 14, 2023. Based on a careful review of the evidence before me and the applicable and persuasive law, I conclude that the procedural protections contained in the revised protocol satisfy the requirements of G. L. c. 10, § 76(d) and Constitutional due process

[1] Chair of the Massachusetts Cannabis Control Commission

[2] Treasurer and Receiver General of the Commonwealth of Massachusetts, in her official capacity

for the proceeding at hand. Accordingly, the Motion for Preliminary Injunction is DENIED and the Motion to Dissolve the Temporary Restraining Order is ALLOWED.

FACTUAL AND PROCEDURAL BACKGROUND

Goldberg suspended O'Brien as Chair of the Commission with pay on September 14, 2023. On October 4, 2023, Goldberg gave O'Brien notice of two bases for O'Brien's suspension. The Commission and its outside counsel engaged separate investigators to conduct investigations into the two areas of concern.[3] O'Brien was given the results of the investigation report concerning the first basis for suspension – O'Brien's allegedly racially insensitive conduct and statements. O'Brien has not yet been provided with the results of the investigation into the second basis for her suspension – O'Brien's conduct toward and statements concerning the Commission's Executive Director.

After O'Brien filed this lawsuit, the parties negotiated a hearing date regarding whether the suspension would result in O'Brien's termination and attempted to negotiate a protocol for the hearing. As noted, after I issued the TRO, the Treasurer presented O'Brien with a revised hearing protocol addressing the principal concerns detailed in the TRO. The revised protocol provides, in material and relevant part, that: (i) the hearing would occur at the Treasurer's office over two, four-hour sessions; (ii) O'Brien would be entitled to legal representation; (iii) the hearing would be presided over by an officiant with the authority to conduct the hearing, ensure it is conducted in a fair and orderly manner, and enlarge the time for the hearing "upon showing of need;" (iv) O'Brien would be provided with an updated statement of reasons for her continuing suspension and possible removal at least fifteen business days before the hearing; (v) O'Brien's counsel would be permitted to "cross examine the investigators

[3] The investigations were solicited by the Commission and the investigators were hired by the Commission's outside counsel and not by the Treasurer.

whose reports have been reviewed by the Treasurer as to the reasons the Treasurer is considering removal;" and (vi) O'Brien would be permitted to argue, submit written statements of witnesses, present live witness testimony, and submit documentary evidence. The revised protocol also requires the Treasurer to provide notice of all 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 or potential removal, and permits the Treasurer to examine and cross-examine any witness who appears, and ask and have written answers from any witness who presents a written statement.

Notwithstanding the additional notification and timing protections contained in the revised protocol, O'Brien presses her claims that (i) there should be an independent finder of fact because Goldberg is biased and not impartial, (ii) there must be a mechanism for the compulsory attendance of witnesses, and (iii) the hearing should be public.[4]

With respect to Goldberg's alleged bias, O'Brien argues that Goldberg cannot be fair because she made the accusations detailed in the October 4 notice, the Treasurer is "aligned with" the Executive Director who previously worked in the Treasurer's office,

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[4] O'Brien has not yet been provided with the results of the second investigation and it is not clear when or if that will happen. O'Brien is generally satisfied with the notice of the evidence regarding the first basis for her suspension contained in the first investigative report although she would like all anonymous sources disclosed. I decline to issue an order in that regard but note that O'Brien would be permitted to probe the sources of the information provided to or obtained by the investigators upon cross-examination. Further, despite the Treasurer's claim that she cannot compel the investigators' attendance, I find it doubtful that that the Treasurer and /or the Commission lack the ability, without process, to ensure the investigators' appearance at the hearing. I note that failure to do so may well implicate due process concerns to be addressed in a future context.

and the Treasurer might be a witness at the hearing as she is familiar with some of the underlying facts.

DISCUSSION

The law governing the relief O'Brien seeks remains the well-known Rule 65 standard. To obtain a preliminary injunction, O'Brien must establish both a likelihood of success on the merits and that irreparable harm will result from denial. See Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). O'Brien also must show that the sought after injunction "promotes the public interest, or, alternatively, . . . will not adversely affect the public.'" Garcia v. Department of Housing and Community Dev., 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003) and Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984).

I. Likelihood of Success on the Merits

O'Brien has not shown a likelihood of success on the merits. The revised protocol ensures that O'Brien will be given sufficient notice of the charges that underlie her suspension and any potential termination and the evidence on which the Treasurer relies, as well as sufficient time for O'Brien to prepare and present a defense. See Flomenbaum v. Commonwealth, 451 Mass. 740, 747 (2008) (appropriate notice requires "notice of the charges" and "an explanation of the . . . evidence."), citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).[5] See also Mathews v. Eldridge, 424 U.S.

[5] To the extent the results or report of the second investigation is not provided to the Treasurer or is no longer a basis on which the Treasurer relies for O'Brien's suspension or potential removal, then notice of the results of that investigation is not required. Thus, I agree that the hearing may be scheduled at least fifteen business days after (i) production of the second investigative report and an updated statement of reasons for suspension and termination; or (ii) an updated statement of reasons for suspension and

319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"), quoting, Armstrong v. Manzo, 380 U.S. 545, 552 (1965). I do not agree that O'Brien is entitled to the additional relief she seeks and to which she claims she is entitled – the appointment of a separate fact finder, a public hearing, or the compulsory attendance of witnesses. Nor do I agree that failure to satisfy those requests is likely to be found Constitutionally infirm.

I begin with the language of the statute: It provides that the Treasurer "may remove a commissioner who was appointed by [the Treasurer] 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." G. L. c. 10, § 76(d). The statute continues: "Before removal, the commissioner shall be provided with a written statement of the reason for removal and an opportunity to be heard." Id.

"A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning." Boss v. Town of Leverett, 484 Mass. 553, 557 (2020), quoting, Sullivan v. Brookline, 435 Mass. 353, 360 (2001). "If the language is clear and unambiguous, it must be interpreted as written." Id. See also DeCosmo v. Blue Tarp Redevelopment, LLC, 487 Mass. 690, 695 (2021) ("[a]s with any question of statutory interpretation, our starting point is the . . . text."), quoting Commonwealth v. Vega, 449 Mass. 227, 230 (2007).

Here, the statute governing removal of a member of the Commission is clear on its face. The Treasurer has the authority to remove a commissioner she appointed. The Treasurer may do so if she determines that one of five bases exists, and, prior to

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termination indicating that the second basis [the subject of the second investigation] outlined in the October 4 Notice is no longer at issue.

removal, provides "a written statement of the reason for removal and an opportunity to be heard." Neither the precise content of the requisite notice nor the precise contours of the obligatory hearing are detailed in the statute. However, I "assume that the Legislature was aware of existing statutes when enacting subsequent ones." Green v. Wyman-Gordon Co., 422 Mass. 551, 554 (1996), citing LaBranche v. A.J. Lane & Co., 404 Mass. 725, 728 (1989). Thus, in enacting G. L. c. 10, § 76(d), the Legislature was aware of G. L. c. 30, § 9 and, importantly, the caselaw addressing its application in particular Levy v. Acting Governor.[6]

A. *Levy v. Acting Governor*

Both sides hotly contest the application and import of the Supreme Judicial Court (SJC's) decisions in Levy v. Acting Governor, No. SJ-2001-0531. I find that the Court's discussion of the procedures required prior to removal of an executive officer in the circumstances of that case is both relevant and persuasive here. To understand why, it is important to understand the nature of the case, the various holdings, and the chronology.

In 2001, the Acting Governor of the Commonwealth suspended and, pending a hearing, removed two members of the Massachusetts Turnpike Authority. The members filed a "verified complaint in the Supreme Judicial Court for Suffolk County pursuant to G.L. c. 214, § 1, seeking declaratory and injunctive relief." Levy v. Acting Governor, 435 Mass. 697, 697 (2002) ("Levy I"). On December 10, 2001, after referral by the Single Justice, the SJC issued an order holding that G. L. c. 30, § 9 conferred "on the

[6] G. L. c. 30, § 9 provides, "[u]nless some other mode of removal is provided by law, a public officer, if appointed by the governor, may at any time be removed by him for cause, and, if appointed by him with the advice and consent of the council, may be so removed with its advice and consent."

Acting Governor the power to remove a member of the Massachusetts Turnpike Authority in accordance with the terms of that statute." Id. at 700.

Thereafter, on December 19, 2001, the Single Justice issued a Memorandum and Order addressing the "type of hearing to be conducted." Levy v. Acting Governor, SJ-2001-0531 (Dec. 19, 2001). The Court (Greaney, J.) concluded (much as I did in issuing the TRO here) that the Acting Governor had not provided adequate notice of the "facts underlying the charges" against the two Turnpike Authority members and, therefore, the hearings were not "in a position to go forward." (Slip. Op. at 1). The Court also held that the Plaintiffs were not entitled to discovery and denied motions "seeking the same." Further, the Court held that it was within the parties' "discretion" whether the hearing should be public, the hearing should be steno graphically recorded, witnesses "should be sworn," and the Plaintiffs should "be given an adequate opportunity to present their side of the controversy." Id. at 2. But, according to the Single Justice , "[t]rial type proceedings (namely, formal questioning and answers, cross-examination, etc.) need not be conducted, and the rules of evidence do not apply." Id. Finally, the Court denied the motion to disqualify the Acting Governor as the "hearing's officer and decision maker" assuming that "she will act impartially and with an open mind." The Court concluded:

> Because the Authority has been given considerable authority by the Legislature, and is intended to be an important guardian of fiscal and other rights of the public, adequate cause for removal has to be demonstrated. This is not an occasion for political theater.

Id. at 3.

The Single Justice was again asked to weigh in on the conduct of the hearing on January 9, 2022, one day before it was scheduled to occur. The Court (Greaney, J.) denied the Plaintiffs' request for an order directing that "(a) cause for their removal be

established through the sworn testimony of witnesses and associated documentary evidence; (b) the plaintiffs be granted an adequate opportunity to question the witnesses who testify as to the facts alleged to support removal and to contest the Acting Governor's documentary evidence; and (c) the plaintiffs be furnished with an adequate opportunity to present their side of the controversy, an opportunity that may not be arbitrarily limited." Levy v. Acting Governor, SJ-2001-0531 (Jan. 9, 2002). The Court concluded that the presiding officer appointed by the Acting Governor would "determine that the information and materials presented in the proceedings meet the measure of basic trustworthiness[,]" and will "have discretion to determine [the hearing's] length and scope to ensure that the Acting Governor, as the decision maker, acts on trustworthy data." Id.

On January 25, 2002, the SJC issued a written decision explaining the rationale for its conclusion that G. L. c. 30,§ 9 gave the Acting Governor the power to remove the two members of the Authority. Because the Turnpike Authority's enabling act contained no removal provisions, the Court considered first whether the Authority was subject to G. L. c. 30, § 9. Levy I, 435 Mass. at 700. It concluded that the "Authority is fitted within the executive and administrative apparatus of the Commonwealth regulated under c. 30; has limited independent existence; is not entirely self-financing; and is subject to certain supervision and control of executive branch officers, as well as the Governor." Id. at 705 (quotations omitted). The Court also considered various legislative amendments to the enabling act (the details of which are not relevant here) to conclude further that

> if the Legislature had desired to maintain the truly 'independent' nature of the Turnpike Authority, free altogether from the Governor's influence, it would likely have done so in an express manner. The Legislature, however, chose not to do so. Thus, where no 'mode of removal' is provided in G.L. c. 81A, the Governor is empowered under G.L. c. 30, § 9, to remove members of the

> Turnpike Authority, consistent with the established general rule that, in the absence of express legislation prohibiting removal, public officers are subject to the authority of the Governor.

Id. at 706.

The Court did not address the additional questions the Single Justice had reserved and reported concerning the scope and conduct of the hearing, whether it should be public, and other procedural rights to be afforded to the Plaintiffs. The Court wrote that it "need not resolve" those issues because, "[i]n the expression of any opinion on [these issues] now, we cannot undertake definitively to adjudicate upon [them], so as to exclude [their possible] reconsideration hereafter." Id. at 702 ("Put differently, the matters raised in these questions are premature for full court consideration."), quoting Trustees of the Smith Charities v. Northampton, 92 Mass. 498, 503 (1865).

The SJC next addressed the case in a written decision issued on May 7, 2002 on certiorari review pursuant to G. L. c. 249, § 4, and after the Acting Governor held the hearing and determined to remove the Plaintiffs.[7] Because the action before it "involve[d] the removal of two members of an essentially independent authority by the Governor for alleged fiscal irresponsibility[,]"and the "Governor's supervisory or managerial interest in the Authority is limited, and it does not extend to the activity at hand[,]" namely, the determination of "the policies of the Authority[,]" the SJC held that the standard of review that should apply is the substantial evidence test, as

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[7] G. L. c. 249, § 4 provides that "[a] civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court . . . ." The parties here agree that there would be a right of review, in the Superior or Supreme Judicial Court of the results of the hearing before the Treasurer pursuant to G. L. c. 249, § 4.

opposed to the arbitrary and capricious test. Levy v. Acting Governor, 436 Mass. 736, 745–747 (2002) ("Levy II") ("'the proper approach in considering the appropriate scope of review [under G.L. c. 249, § 4,] is to evaluate the nature of the action sought to be reviewed.'"), quoting, Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 49 (1977). The SCJ cautioned that "[r]emoval of a member of the Authority in the circumstances of this case is not a decision to which deference is accorded. Rather, it is a decision that must be given very close scrutiny." Id.

Because of the intended and substantial independence of the Turnpike Authority, the Court concluded that "cause to remove a member should be in the order of malfeasance, misfeasance, or willful neglect of duty, the standard of removal applicable to comparable independent authorities." Id. at 749. Finally, the SJC considered the evidence and stated basis for removal, holding that, because the case "boil[ed] down to a difference of opinion between the Governor and two members of the Authority over the policy of the Authority and the ability of the members to fix tolls[,] . . . [t]hat difference of opinion does not constitute substantial evidence that [Plaintiffs] acted in a manner that warrants removal by the Governor for cause." Id. at 752. The SJC vacated the Plaintiffs' removal. Id. Because it found in favor of the Plaintiffs, the Court did not address any claim that the Plaintiffs had been denied procedural due process. Id.

B. Analysis

The Levy decisions provide analogous and, in my view, exceedingly persuasive guidance. While this case presents an issue of first impression concerning the procedural protections required under G. L. c. 10, § 76(d), the Levy decisions provide a clear analysis of the process to be afforded a member of an independent agency, governmental corporate body, or, as here, independent commission, before removal.

Such process must include adequate notice of the charges and evidence supporting those charges, and a fair and meaningful opportunity to be heard. Due process does not require a public hearing, although the parties can agree to one. Due process does not require the compulsory attendance of witnesses. And due process does not require the appointment of an independent fact finder, not contemplated by the statute.[8]

As the SJC and the Single Justice in Levy observed, however, the removal of a commissioner of an independent commission, even when permitted by the Legislature under a statute, such as G. L. c. 30, § 9 or G. L. c. 10, § 76(d), is a serious proposition that must be done with due regard for the commissioner's rights, as well as the political independence of the Commission. I am persuaded that the Treasurer understands her obligations and has put together a protocol for the hearing that recognizes the importance of the decision to be made and affords O'Brien a full, fair, and meaningful opportunity to be heard consistent with the statute and her Constitutional rights.[9]

I am not persuaded by O'Brien's arguments to the contrary. First, O'Brien argues that the statutory text of G. L. c. 30, § 9 differs from G. L. c. 10, § 76(d). That is true. But both statutes address the right of Constitutional and Executive officers to remove an individual from a governmental agency or commission. The difference between the two stems from the Legislature's inclusion in G. L. c. 10, §76(d) of specified and limited grounds for removal, grounds which comport with the SJC's decision in Levy II that,

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[8] I address the argument about Goldberg's alleged bias further infra.

[9] I do not discount the judicial review that all parties agree is available to O'Brien pursuant to G. L. c. 249, § 4, which is another opportunity for her to be heard to challenge the evidence or the conclusions reached at the hearing. See, e.g., Monahan v. Romney, 2009 WL 10694327, at *11 (D. Mass. Sept. 3, 2009), aff'd, 625 F.3d 42 (1st Cir. 2010) ("Mass. Gen. Laws ch. 249, § 4, afforded Monahan the right to a constitutionally sufficient hearing on his claim that he had been improperly removed from office without cause.").

because the Transportation Authority was – much like the Commission here – largely independent of the Governor, the "cause" necessary for removal requires "malfeasance, misfeasance, or wilful neglect of duty," and not a disagreement over policy. Levy II, 436 Mass. at 749. Thus, by including similar specified grounds for removal in G. L. c. 10, § 76 (d), the Legislature documented the independence of the Commission and protected commissioners from removal for poor performance or differences over policy.[10]

O'Brien's reliance on Flomenbaum v. Commonwealth, 451 Mass. 740 (2008), is misplaced. There, the Court addressed Governor Patrick's removal of the Commonwealth's chief medical examiner and determined that the Office of the Chief Medical Examiner (OCME), *unlike the Turnpike Authority*, was not an independent corporate body "in which cause to remove a member must be in the order of malfeasance, misfeasance, or wilful neglect of duty." Id. at 746. Rather, because the OCME fell "squarely within the operations, and under the control, of the executive branch" the Court determined that removal of the chief medical examiner was permissible for the reasons "traditionally offered" for an employee's discharge, namely, "a dispute over policy," "interest of the public," and "less than complete confidence [in an official's] competency and efficiency." Id., 451 Mass. at 746–747. In other words, the position at issue lacked the independence required to invoke the heightened standard for removal detailed in Levy II. In Levy II, and in Flomenbaum, the Court applied *different* standards of cause and review for the two situations. Levy – in which the

[10] The Commission is not a wholly separate and independent entity. The Legislature chose to include removal power in the Governor, Treasurer, and Attorney General, albeit circumscribed power as discussed above.

Court considered the removal of a member of a relatively independent corporate body – is analogous here. Flomenbaum less so.

O'Brien argues next that Goldberg's stated bases for removal do not rise to the cause standard contained in the statute but reflect mere policy disagreements or disputes over personnel management or other operational matters. I reach no conclusion on that argument as it is premature and cannot be resolved at this time on this record on a request for an injunction. Rather, the arguments must be pressed and resolved first by the Treasurer and then, if O'Brien is unsuccessful, in an action for certiorari review. Put elsewise, it is premature and inappropriate for this Court to resolve on this record whether the bases for removal contained in the October 4 notice satisfy the statute as the Treasurer has yet to take final action. Such resolution may well "exclude" appropriate "consideration . . . hereafter." Levy I, 435 Mass. at 702.

Finally, O'Brien's reliance on cases involving the right to a "name clearing" hearing when an individual is discharged based on "stigmatizing charges" do not persuade me that she is entitled to a public hearing, subpoena power, or another fact finder. In Fontana v. Commissioner of Metro. Dist. Comm'n, 34 Mass. App. Ct. 63 (1993), which dealt with the right to a name-clearing hearing under the civil service statute, G. L. c. 31, § 41, the Appeals Court did not address any Constitutional due process arguments but, "to forestall any constitutional challenges to the sufficiency of the hearing," advised the parties to "follow the procedure outlined in footnote 14 of Stetson v. Selectmen of Carlisle[.]" Fontana, 34 Mass. App. Ct. at 72. In Stetson, the SJC stated that the Constitutional requirements for a name clearing hearing are "notice of the specific charges, an opportunity to present witnesses, and, barring special considerations, an opportunity to cross-examine those who charge him with any wrongdoing on which the [decision maker] relied in discharging him." Stetson v. Bd. of

Selectmen of Carlisle, 369 Mass. 755, 765 n.14 (1976). Those elements are contained in the revised protocol which will govern O'Brien's hearing. Therefore, to the extent O'Brien is entitled to a name-clearing hearing, she will be afforded the due process outlined by the SJC in Stetson.

C. Goldberg's Alleged Bias

I am also not persuaded by O'Brien's argument that the Treasurer cannot be the finder of fact in connection with O'Brien's removal. Relying on Williams v. Pennsylvania, 579 U.S. 1 (2016), O'Brien argues that "no man can be the judge in his own case." That is not the situation presented here. Goldberg is not the "accuser" and "adjudicator" in this matter. Goldberg informed O'Brien of the reasons for O'Brien's suspension and possible termination as she was required to do under G. L. c. 10, § 76(d) and as O'Brien has demanded in this case. See G. L. 10, § 76(d) ("Before removal, the commissioner shall be provided with a written statement of the reason for removal and an opportunity to be heard.") That Goldberg concluded, based on the information provided to her, that suspension with pay was warranted in advance of the statutory removal hearing does not make her too biased to fulfill her statutory role.

Second, Goldberg's previous professional relationship with the Executive Director does not persuade me that she is biased in connection with exercising her power under G. L. c. 10, § 76(d). Although the Commission's Executive Director worked in the Treasurer's office until November 2017 (six years ago), and the Treasurer wrote an enthusiastic public personal note upon his departure, there is no non-speculative evidence before me that the Treasurer had or has a personal relationship with the Executive Director. O'Brien avers on "information and belief" that the Executive Director provided advice and counsel to Goldberg about the appointment of the Chair of the Commission. If true, that is unsurprising since the statute permits the

Treasurer to select the Chair and the Executive Director would have relevant insight as to the qualities needed in a chair.

Finally, O'Brien argues that the Treasurer's involvement in the investigation, namely, the receipt of the first investigator's report and knowledge of the Executive Director's complaints about O'Brien's behavior evidence bias such that Goldberg cannot be the fact finder. I am not persuaded that gives rise to actual or apparent bias. The Treasurer alone has the authority to remove O'Brien from the Commission and it is to be expected that she would want to be given or be made aware of any information that might bear on that potentiality.

Nor do the cases O'Brien relies on persuade me as they concern wholly inappropriate conduct of a kind not alleged here. In Doe v. Sex Offender Registry Bd., 84 Mass. App. Ct. 537, 540 (2013) the Court held that the Plaintiff's due process rights were violated due to the hearing examiner's conduct that was "inappropriate, unprofessional, troubling, and suggestive of a prejudicial predisposition" as thoroughly detailed in footnote 2 of that decision. Williams v. Pennsylvania, 579 U.S. 1, 9 (2016), a death penalty case, concerned a judge on the State Supreme Court who "had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case" and who refused to recuse himself from the post-conviction motion. Id.

Nothing remotely similar is alleged here. The sum total of the alleged evidence of bias is that Goldberg provided a detailed letter of the allegations about O'Brien, had a professional relationship with the Executive Director six years prior, received the investigator's report from the Commission directly and before O'Brien did, was kept abreast of the work of the second investigator, and has some personal knowledge of the

underlying facts. None of that amounts to "collaboration" or evidences bias "too high to be constitutionally tolerable." Williams, 579 U.S. at 4 (Quotations omitted).[11]

II. Irreparable Harm and Public Interest

After issuance of the TRO, and O'Brien having been provided an updated protocol assuring adequate time and the necessary notice to prepare for the hearing, as well as the right to examine witnesses and present evidence, I conclude that O'Brien will not be irreparably harmed by proceeding with the hearing and, if dissatisfied, seeking judicial review in the nature of certiorari pursuant to G. L. c. 249, § 4. See Amorello v. Romney, No. SJ-2006-0311 (July 26, 2006) (Spina, J.) (no irreparable harm where party has an "adequate remedy at law" through judicial review), citing Levy II, 436 Mass. at 752 (vacating removal of Turnpike Authority members). On the public impact, given my conclusion that the process now contemplated satisfies the statute and O'Brien's due process rights, there is a strong public interest in finality.

Pursuant to the protocol, the hearing will not commence for at least fifteen business days after the issuance and receipt of the second investigator's report and the Treasurer's provision of an updated statement of reasons for removal. If the second investigator's report is not provided to the Treasurer, or the Treasurer determines that the results of that investigation do not support removal and the conduct investigated, therefore, is no longer a ground for removal, the Treasurer shall so inform O'Brien in an updated statement of reasons for removal at least fifteen business days before the hearing.

[11] I assume, without deciding, that Article 29 of the Massachusetts Declaration of Rights applies to the Treasurer in her role under G. L. c. 10, § 76(d) to determine whether removal is permissible and appropriate under the statute.

The public interest in this matter is high. However, as the SJC warned, political theater should be avoided. The hearing should be held as promptly as possible, and a decision rendered. If necessary, O'Brien can then seek certiorari review of the Treasurer's final decision pursuant to G. L. c. 249, § 4.

ORDER

Having carefully considered the information before me, Chair Shannon O'Brien's Motion for Preliminary Injunction is **DENIED** and Defendant's Motion to Dissolve the Temporary Restraining Order is **ALLOWED**.

Debra A. Squires-Lee
Justice of the Superior Court

December 22, 2023