

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 IN THE MATTER OF:)
 COMPLAINT C2021-016)
)
 Kim Benson,)
 Complainant.)
)
 Kenneth Loveless,)
 Respondent.)
 _____)

BEFORE THE STATE ETHICS COMMISSION

**ORDER DENYING RESPONDENT’S
MOTION TO ADMIT
ADDITIONAL EVIDENCE**

This matter comes before the South Carolina State Ethics Commission (Commission) on Respondent’s Motion to Admit Additional Evidence¹ (Motion) filed on February 20, 2024. The Commission’s Counsel filed a Response on March 14, 2024, and Respondent filed a Reply on March 19, 2024. The Appellate Panel heard oral arguments on March 21, 2024.

FACTS/PROCEDURAL HISTORY

On February 17, 2021, the above-referenced Complaint was filed against Respondent, a member of the Board of Trustees (Board) for School District Five of Lexington and Richland Counties (District) from 2018-2022. The Complaint alleged, among other things, that Respondent improperly participated in matters involving Contract Construction, a business with which Respondent was associated, regarding the construction of Piney Woods Elementary School (PWES). A public hearing was held on February 16, 2023. Numerous individuals attended Respondent’s public hearing, including an employee from the State Inspector General’s Office (SIG).² Following the hearing, the SIG employee requested and received an audio recording of Respondent’s public hearing.

On March 24, 2023, a Decision and Order was issued finding Respondent violated the Ethics

¹ Included in the Motion was a request to stay the March 21, 2024 appellate hearing pending the outcome of this Motion. Based on the timing of this Motion’s oral argument, this issue is moot.

² The SIG was established by the South Carolina General Assembly in 2012 and, in relevant part, exists to investigate and address allegations of fraud, waste, abuse, mismanagement and misconduct in public schools.

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Act as follows:

COUNT ONE FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED. That Kenneth Loveless, Lexington-Richland School District Five Board Member, did in Richland County, write a letter dated March 24, 2020 inquiring about construction work of a district facility by Contract Construction, Inc., a business with which he was associated, in violation of Section 8-13-700(B).

COUNT TWO FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED. That Kenneth Loveless, Lexington-Richland School District Five Board Member, did in Richland County, on June 15, 2020, participate in discussion about construction of a district facility by Contract Construction, Inc., a business with which he was associated, in violation of Section 8-13-700(B).

COUNT THREE FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED. That Kenneth Loveless, Lexington-Richland School District Five Board Member, did in Richland County, on September 14, 2020, participate in discussion about construction of a district facility by Contract Construction, Inc., a business with which he was associated, in violation of Section 8-13-700(B).

On April 3, 2023, Respondent filed a Respondent's Request for Review of the Hearing Panel's Decision and Order. An appellate hearing was scheduled for March 21, 2024.

In August of 2023, prior to the appellate hearing, the SIG issued a report entitled "Review of Project Management and Internal Controls" related to the District's construction of PWES. According to the report, the SIG's investigation covered activities occurring from November 2016 through November 2022. (SIG, p.2). The scope and objective of the SIG's "limited review examined contractor billing, actions of the procurement selection committee, the District's compliance with its procurement code, and contractor-related transactions," to include "potential conflicts of interest between or among the procurement selection committee members, the general

contractor or subcontractors.” (SIG, p.1). Under a portion entitled “Methodology,” the report provided:

The SIG reviewed relevant documentation, including emails, provided by the District, and applicable state and federal laws, regulations, and policies. The SIG conducted interviews of current and former District leadership, trustees, employees, representatives, project managers, and contractors for the PWES project, as well as the state’s Division of Procurement Services, the Office of State Engineer officials, the South Carolina Department of Education (SCDE) officials, the Office of the State Auditor, the State Ethics Commission, external auditors that provided services to the District, and other persons associated with the PWES project.

(SIG, p.1).

Following its investigation, the SIG made the following findings, in relevant part:

- (1) The SIG determined the District’s accounts payable officials and project managers did not ensure sufficient documentation was provided by Contract Construction to support the amount requested for payment in the pay apps and that the District failed to provide proper contract management and oversight of the payment process.
- (2) The SIG determined that a selection committee member prepared written statements as required by the South Carolina Code of Laws §8-13-700(B)(3) that provided notice to the selection committee of his/her potential conflict of interest, and the agency head was apprised of the member’s potential conflict and deemed him/her qualified. The SIG determined District officials and selection committee members were unable to provide the identity of the appointing official, documentation regarding the appointments, the timing of the appointments, or the criteria used for determining qualified committee members.
- (3) The SIG determined that the Board’s disregard of at least three legal reviews, including two investigations, in order to pursue ethics actions against a selection committee member constituted a waste of District resources, amounting to at least \$12,605 and Board interference in violation of Board policy BBA.
- (4) The SIG determined that the District’s execution of a Buyer Agency Agreement with The Education Group, Inc. without Board approval was a violation of the District’s procurement code. The SIG determined that the District issued an RFP seeking a certified public accounting firm to provide procurement audit

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services for FYs 2019-2021, with the option to also audit FYs 2017 and 2018. As specified in the Scope of Work of the RFP, the procurement audit was required to be performed in accordance with the agreed upon audit procedures issued by the DPS. However, the audit agreement was changed by the Board and District representatives from a procurement audit to a procurement consulting services contract, which was a substantial departure from the RFP requirements that resulted in the waste of \$105,650 in District resources.

(SIG, pp.18-19).

At its conclusion, the SIG report provided, in relevant part:

The SIG extends its appreciation to the District's current and former leadership, Board members, employees, representatives, project managers, and contractors for the PWES project. In addition, the SIG is appreciative of the collaboration with the state's Division of Procurement Services, the Office of the State Engineer, the South Carolina Department of Education, the Office of the State Auditor, the State Ethics Commission, the District's external auditors, and other persons associated with the PWES project for their assistance and cooperation provided during this review.

On January 23, 2024, Respondent submitted a Freedom of Information Act (FOIA) request to the Commission seeking all documents exchanged between the Commission and the SIG concerning Respondent's complaint matter. Commission staff provided Respondent with emails dated February 17, 2023 and February 21, 2023 between a SIG employee and the Commission's Executive Director. Within this exchange, the SIG employee sought an audio recording of the public hearing, as well as any exhibits from the public hearing. The Executive Director responded by advising the SIG employee how to obtain the audio recording.³

On February 13, 2024, Respondent submitted a "Request for Subpoenas" asking the Commission to issue subpoenas, in relevant part, as follows:

1. To the custodian of the records of the Office of Inspector General for any and all documents, correspondence, communications contained

³ Although the SIG employee requested the public exhibits from Respondent's public hearing, the Executive Director did not provide these to the SIG employee due to an oversight. No additional communications between the SIG employee and the Executive Director occurred.

on a compact disc sent by Brian D. Lamkin to Representative Jay Kilmartin on October 19, 2023 in OIG File No. A-4-0139 . . .

2. To the Office of the Inspector General commanding the deposition of State Inspector General Brian D. Lamkin.
3. To the State Ethics Commission and its Executive Director, Meghan Walker, for any and all documents, correspondence, and communications sent to or received from any employee, agent, investigator, or staff of the Office of Inspector General as set forth in page 1 of the August 18, 2023 report of the Office of the State Inspector General regarding [PWES] Construction; and a list setting forth all individuals from the State Ethics Commission who were interviewed in connection with OIG's report described above.
4. To Thomas William McGee III, Nelson Mullins, 1320 Main Street, Columbia, SC 29201 for all documents provided by Gregory Hughes of Contract Construction Inc. . . .

Following additional contact with Commission staff, Respondent filed this Motion.

DISCUSSION

Respondent asks the Appellate Panel to (1) supplement the record with the August 2023 SIG report and (2) permit Respondent to engage in additional discovery, admitting “into the record any relevant evidence produced in response to [the aforementioned] subpoenas . . .”⁴ (Motion, p.2). Respondent claims “the information and communications exchanged between the [SIG] and the Commission are relevant and should be admitted into the record because Respondent was a sitting member of [the District Board] during the construction of [PWES] and the allegations made against Respondent in this matter stem primarily from the construction of [PWES].” (Reply, p.4) In support of this argument, Respondent relies on S.C. Code Ann. §§ 1-23-320(G)(1)-(2), which provides that the “record in a contested case must include all pleadings, motions, intermediate rulings, and

⁴ Respondent's Motion briefly raises the issue of information being “inappropriately placed” in Motions to Quash filed by individuals who were served with Commission subpoenas at Respondent's request during the discovery phase of this Complaint matter. To the extent Respondent is requesting that portions of these documents should be stricken from the record, this request is denied because (1) pleadings are not evidence; and (2) if these pleadings were objectionable, Respondent should have filed a Motion to Strike the offending portions at the time of submission.

depositions; and evidence received or considered.” Respondent argues the information he seeks is relevant because it constitutes “evidence received or considered by the Commission and is therefore material to the decision reached by the [Hearing P]anel.” (Reply, pp.2-3). As discussed herein, the Commission disagrees and Respondent’s Motion is denied.

S.C. Code Ann. Regs. 52-807 allows additional evidence to be added to the record when “necessary for completion of the record in a case on review.” In ruling on an application to submit additional evidence, the Commission must consider two (2) factors: (1) the materiality of the proposed additional evidence; and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. See Brown v. Peoplelease Corp., 402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013). Material evidence is that which would present a reasonable possibility of a different outcome. See DeHart v. SCDHHS, No. 98-ALJ-08-0096-AP, 1998 WL 682496 (S.C. Admin. L. Ct. Sept. 14, 1998); see also Wright v. Strickland, 306 S.C. 187, 410 S.E.2d 596 (Ct. App. 1991) (finding the moving party did not proffer any testimony or show that the evidence could make any difference to the outcome of the case).

The Commission finds Respondent has failed to point to a single fact that would create a reasonable possibility of a different outcome in Respondent’s complaint matter. There are no facts in the SIG report that relate to Respondent’s relationship with Contract Construction, nor is there any indication in the SIG report that Respondent did not engage in the conduct found to be violative of the Ethics Act as determined by the Panel’s Order.

The Commission further finds that Respondent cannot establish a good reason for failing to introduce any fact set forth in the SIG report because, according to the report, the SIG’s period of review was from 2016-2022. Respondent’s hearing did not occur until February 16, 2023, meaning any fact uncovered by the SIG could have also been discovered by Respondent prior to the hearing. Indeed, Respondent had the ability to engage in discovery prior to the Panel hearing, and he exercised that right by issuing numerous subpoenas and conducting several depositions. In fact, one

of the subpoenas currently sought by Respondent relates to Greg Hughes, an individual he has already deposed.

Finally, the Commission finds Respondent's reliance on §§ 1-23-320(G)(1)-(2) is misplaced. These statutory provisions are a clear reference to the fact-finder, which is the Hearing Panel in this instance. The only information received or considered by the Hearing Panel was the information presented during Respondent's public hearing. Respondent is undoubtedly aware of this information given he was present and represented by counsel for the duration of the hearing.

CONCLUSION

Based on the reasoning set forth above, Respondent's Motion to Admit Additional Evidence is hereby DENIED and this matter shall proceed to an appellate hearing.

AND it is **SO ORDERED**.



Neal D. Truslow
Chairman, Appellate Panel

June 3, 2024
Columbia, South Carolina

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