

STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS

540 Broadway
Albany, NY 12207

STATE OF NEW YORK

In the Matter of BEN MASAITIS, the
former Budget Director of the New York
State Theater Institute,

DECISION AND
NOTICE OF CIVIL ASSESSMENT

Respondent

Alleged Violations of Public Officers Law
§§74(3)(d) and (h)

The New York State Joint Commission on Public Ethics ("Commission"), at its January 11, 2012 meeting, considered the Hearing Officer's Findings of Fact and Recommendation ("Hearing Officer's Recommendation" or "HO Recommendation," which is attached as Exhibit A) in the Matter of Ben Masaitis ("Mr. Masaitis" or "Respondent"), the former Budget Director for the New York State Theater Institute ("NYSTI")

In accordance with 19 NYCRR Part 941.15(c), the Hearing Officer's Findings of Fact are incorporated herein by reference and made part of this Decision and Notice of Civil Assessment. The Commission adopts the Hearing Officer's Findings of Fact.

The Commission determines that there is insufficient evidence to support the charge that Respondent knowingly and intentionally violated Public Officers Law §74(3)(d) and violated Public Officers Law §74(3)(h). Thus, for the reasons set forth below, the Commission adopts the Hearing Officer's Recommendation and determines that the Commission failed to demonstrate that Respondent violated Public Officers Law §§74(3)(d) and (h). Finally, the Commission

adopts the Hearing Officer's Recommendation with respect to the civil penalty assessment and since no violation has been found, no penalty is assessed in this matter.

I. PROCEDURAL BACKGROUND

On December 9, 2010, the Commission on Public Integrity ("CPI") issued a Notice of Reasonable Cause ("NORC") pursuant to and in accordance with Executive Law §94(12)(b) and 19 NYCRR Part 941.3 alleging that Masaitis violated two provisions of the State Code of Ethics, Public Officers Law §§74(3)(d) and (h). HO Recommendation at 1.¹

An evidentiary hearing was conducted on March 16, 2011 pursuant to and in accordance with 19 NYCRR Part 941.6 *et seq.*² Respondent neither testified on his own behalf nor called any witnesses. (Transcript at 73)

On November 9, 2011, after providing both parties an opportunity to submit post-hearing memoranda, the Hearing Officer's Recommendation was issued pursuant to 19 NYCRR Part 941.15(a). The parties were provided with an opportunity to respond in writing to the Hearing Officer's Recommendation by submitting briefs directed to CPI within 10 days of the Hearing Officer's transmittal of the Hearing Officer's Recommendation, limiting the briefs to the record evidence. 19 NYCRR Parts 941.15(b); 941.17 ("Record of Hearing"). Both Respondent and CPI staff timely submitted such briefs, which have been provided to the Commission members.

The Commission has "60 days from receipt of the briefs, or as soon thereafter as possible, in which to issue a final decision. The Commission may adopt the Findings of Fact and

¹ Unless otherwise indicated, statutory references are to the versions of the cited statutes that existed before the August 15, 2011 effective date of the Public Integrity Reform Act (L. 2011, ch. 399) ("Act"). The Commission's regulations continue to be effective as previously promulgated. The NORC is part of the Hearing Record, 19 NYCRR Part 941.17(a), and is publicly available on JCOPE website, <http://www.jcope.ny.gov/enforcement>.

² The Hearing Notice is available on the Commission's website, <http://www.jcope.ny.gov/enforcement>.

Recommendation of the Hearing Officer in whole or in part, or it may reverse, remand and/or dismiss the Hearing Officer's Finding of Fact and Recommendation based upon the record produced at the hearing." 19 NYCRR Part 941.15(c). In other words, the Commission must now determine this matter *de novo*.

On August 15, 2011, Governor Cuomo signed the Public Integrity Reform Act (L. 2011, ch. 399) ("Act"). Pursuant to section 22 of the Act, as of August 15, 2011 ("effective date"), CPI was prohibited from imposing discipline. On December 12, 2011, the Joint Commission on Public Ethics replaced CPI and, under Act §16, the Commission is authorized to discipline and, further, to complete any business or matter undertaken by CPI that remains unfinished, as follows:

Any business or other matter undertaken or commenced by the state commission on public integrity or the legislative ethics commission pertaining to or connected with the functions, powers, obligations and duties hereby transferred and assigned to the joint commission on public ethics, and pending on the effective date of this act may be conducted and completed by the joint commission on public ethics in the same manner and under the same terms and conditions and with the same effect as if conducted and completed by the former state commission on public integrity or the legislative ethics commission.

II. COMMISSION JURISDICTION

The State Code of Ethics, set forth in Public Officers Law §74, provides, in pertinent part, as follows:

2. Rule with respect to conflicts of interest. No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

3. Standards.

* * *

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.

* * *

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

III. ARGUMENT

A. Standard Of Proof

Pursuant to the State Administrative Procedure Act (“SAPA”) §306(1), 19 NYCRR Part 941.6(d), and reported judicial decisions (*e.g.*, Miller v. DeBuono, 90 N.Y.2d 783 (1997)(Levine, J.), in making its findings of fact after a hearing, the Commission applies the “substantial evidence” standard of proof. *See Generally* New York Jurisprudence, Administrative Law §275 (2d Ed. 2009). Substantial evidence “is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt.” 300 Gramatan Avenue, Assoc. v. State Division of Human Rights, 45 NY2d 176, 180-181 (1978) (citations omitted).

Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact (New York State Labor Relations Bd. v. Shattuck, Co., 260 App. Div. 315, 317). Essential attributes are relevance and a probative character [citations omitted]; marked by its substance – its solid nature and ability to inspire confidence, substantial evidence does not rise from surmise, conjecture, speculation or rumor.

Id. at 180 (citations omitted).

B. Authorized Penalties

Executive Law §94(13) and Public Officers Law §74(4) authorize assessment of a civil penalty of up to \$10,000 against a State officer or employee found to have knowingly and intentionally violated Public Officers Law §74(3)(d). No civil penalty is authorized or may be assessed against a State officer or employee found to have violated Public Officers Law §74(3)(h). Thus, proof of a knowing and intentional violation of §74(3)(h) is not required. Accordingly, the Commission must now determine whether substantial record evidence shows that Masaitis knowingly and intentionally violated Public Officers Law §74(3)(d) and violated Public Officers Law §74(3)(h).

C. The Commission Failed to Establish that Masaitis Knowingly and Intentionally Violated §74(3)(d) and Violated §74(3)(h)

Under the Code of Ethics set forth in Public Officers Law §74, a State officer or employee must avoid conduct that makes it reasonably appear that he or she is engaged in conduct that violates his or her public trust, as well as conduct that gives rise to an actual conflict of interests. *e.g.*, Advisory Opinion No. 96-06.³ As the Attorney General said in an opinion construing the State Code of Ethics:

A public official must not only be innocent of any wrongdoing, but he must be alert at all times so that his acts and conduct give the public no cause for

³ Unless indicated otherwise, all cited advisory opinions were issued either by the State Ethics Commission or the Commission on Public Integrity. Under Executive Law §94(1), as amended by the Act, the Commission will accept as precedent the advisory opinions issued by these two predecessor agencies, except for those advisory opinions the Commission determines after a comprehensive review are inconsistent with the law as amended by the Act or with one another.⁴ <http://www.jcope.ny.gov/enforcement/>

suspicion. He must give no appearance of a potential conflict between his duties and personal activities even though an actual conflict is not present . . .

(1979 Op. Atty. Gen 66).

Since Masaitis served as Budget Director for NYSTI, his conduct falls short of the standards of performance an individual in his position should aspire to achieve and practice. However, it cannot be said, based on the evidence presented at hearing, that Masaitis knowingly and intentionally violated Public Officers Officer §74(3)(d) by using or attempting to use his official position to secure an unwarranted privilege or exemption for Ms. Snyder-- namely, the unwarranted privilege of having false exculpatory documents made part of NYSTI's financial records at a time when Masaitis was aware that the State Inspector General was investigating NYSTI's finances. No evidence was presented at hearing to support the conclusion that the processing of cash reimbursements with back-dated memoranda, one of which was allegedly penned by Masaitis himself, was knowingly done in an effort to deceive or bestow a benefit. HO Recommendation at 4-5.

Similarly, while the State must be vigilant in requiring contractors to submit proper documentation for the issuance of an IRS 1099 form, it cannot be said, under the unique and exigent circumstances involved in this case, that Masaitis had any choice or authority to do anything but pay the recalcitrant snow plow operator, absent such documentation. HO Recommendation at 7. Moreover, the evidence introduced by the Commission at hearing did not support a finding that Mastitis's failure to issue a 1099 form resulted in conferring or an intention to confer a benefit or privilege upon the snow plow operator. HO Recommendation at 6-7.

It is well-established that the Commission need not show that a State officer or employee provided an unwarranted privilege directly to another in order to prove that the State

officer or employee violated §74(3)(d). It is enough for the Commission to show a State officer or employee used or attempted to use his or her official position in such a way that he/she or any other person received an unwarranted privilege. Thus, for example, the Commission determined that the Governor's Communications Director violated §74(3)(d) when he used the State Police to gather information to be used against the Governor's political opponent because the Governor's opportunity to benefit from the use of such information so gathered for such a purpose was an unwarranted privilege for the Governor. *See* Decision and Notice of Civil Assessment issued October 7, 2009, In The Matter Of An Investigation Into The Alleged Misuse Of Resources Of The Division Of State Police, Darren Dopp, Communications Director To Governor Eliot Spitzer, Respondent.⁴

In this case, the evidence presented fails to establish that Masaitis used or attempted to use his official position in an effort to gain an unwarranted privilege for himself or another.

IV. CONCLUSION

The Commission determines that there is insufficient evidence to support that Respondent knowingly and intentionally violated Public Officers Law §74(3)(d) and that he violated Public Officers Law §74(3)(h). Thus, for the reasons set forth above, the Commission adopts the Hearing Officer's Recommendation that Respondent did not violate Public Officers Law §74(3)(d) and (h). Finally, the Commission adopts the Hearing Officer's Recommendation with respect to the civil penalty assessment and since no violation has been found, no penalty is assessed in this matter.

⁴ <http://www.jcope.ny.gov/enforcement/>

Hon. Janet DiFiore, Chair
Ravi Batra
Hon. Joseph Covello
Hon. Vincent A. DeLorio
Daniel J. Horwitz
Seymour Knox, IV
Gary J. Lavine
David A. Renzi
George H. Weissman
Members

Dated: January 11, 2012

Attachment: Exhibit A – Hearing Officer’s Findings of Fact and Recommendation

Exhibit A

In the Matter of BEN MASAITIS, the former Budget
Director for the New York State Theater Institute

Respondent

Alleged Violations of Public Officers Law sections
74(3)(d) and (h)

A Notice of Reasonable Cause in this Matter was issued on December 9, 2010 alleging that Ben Masaitis, former Budget Director of the New York State Theater Institute ("NYSTI") knowingly and intentionally violated Public Officers Law sections 74(3) (d) and (h). On March 16, 2011 a hearing was held and on April 22, 2011 the parties submitted post-hearing memoranda. Rebuttal papers, if any, were to be submitted by May 6, 2011 but neither party made such a submission.

Respondent Masaitis is charged with violating section 74(3) paragraphs (d) and (h) of the Public Officers Law. Such violations must be shown to have been "knowingly and intentionally committed" pursuant to Public officers Law section 74(4). Paragraph (d) of section 74(3) prohibits an officer or employee of a state agency, member of the legislature or legislative employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others, while paragraph (h) states that such officer, employee, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his public trust. Mr. Masaitis is charged with having violated each subdivision three times, first when he accepted three memoranda relating to reimbursements made by his supervisor, Patricia Snyder, and then another three when he allegedly instructed a subordinate not to issue 1099 federal tax forms to an independent contractor for snowplowing work performed in 2004, 2005 and 2007..

FINDINGS OF FACT

1. Mr. Masaitis was the Budget Director at NYSTI in 2008 when the New York State Inspector General ("IG") opened an investigation into NYSTI's finances. His duties as Budget Director included maintaining "general ledger, accounts receivable and accounts payable records; oversee{ing} reconciliation of generated revenue accounts;" and being responsible for the "organization's financial reporting, as required by the state of New York." (Commission's Exhibits 1, 2).

2. In June of 2008 the IG began its investigation and Mr. Masaitis became aware of it when he attended meetings with the IG. The IG requested financial records at these meetings and, on August 28, 2008, issued a *subpoena duces tecum* seeking lists of bank accounts as well as signature cards and monthly reports disclosing all transactions, "including transaction descriptions of withdrawals, deposits

and wire transfers sent and received."In the end, the IG had "many thousands" of financial records turned over to it as part of its investigation of NYSTI (Transcript, pp.25-26, 42; Commission's Exhibit 3).

3. In November and December the IG was stationed at the NYSTI offices to examine its financial records. During this period, the IG found a November 21, 2008 Cash Receipts Transmittal Form with three typed memoranda attached (Commission's Exhibit 4). The memoranda were from Patricia Snyder, Executive Director at NYSTI, to Mr. Masaitis and in each she stated that she was reimbursing NYSIT for certain expenses, which total \$477.10. These included: a memo dated November 3, 2006 stating that a reimbursement of \$125 was enclosed for the cost of her husband's ticket to a Sage College event held on October 26, 2006; a memo dated November 30, 2007, which stated "sorry I am late with the reimbursement" and that \$125 was enclosed for the cost of her husband's ticket to a Sage College event held on October 19, 2007; and, an undated memo which stated that "attached" was a reimbursement for \$227.10 for the cost of an airline ticket for her husband purchased on March 27, 2006 (Transcript, pp. 26,35; Commission's Exhibit 4).

4. Ms. Snyder made these reimbursements in cash and gave them to Mr. Masaitis with the memoranda. On each there is a hand written note purportedly written by Mr. Masaitis, stating the amount and "received in cash," and signed below these comments was what appears to be the respondent's name. In addition, on the memo dated November 30, 2007, the handwritten note also contains the date "11/30/07" (Commission's Exhibits 4, 27).

5. Other than the "11/30/07" date handwritten on the memorandum dated November 30, 2007, there is nothing inaccurate on these memoranda (Transcript, pp.37-38; Commission's Exhibit 4).

6. These reimbursements were deposited in First Niagara Bank on November 21,2008, pursuant to the Cash Receipt Transmittal Form dated November 21, 2008 which contains a handwritten notation that \$477.10 should be credited, and copies of a First Niagara deposit slip showing a cash deposit of \$477.10 to the NYSTI account on November 21, 2008 (Transcript, p. 28-29; Commission's exhibit 6).

7. Indeed, respondent's attorney stipulated on the record that the November 21, 2008 deposit slip was responsive to the subpoena *duces tecum* and that it was "for \$477.10 and reflects an actual cash deposit that is reflected on exhibit 4 as the sum total of the three different cash reimbursements made in November of 2008 by Ms. Snyder and is referenced on the first page of exhibit 4."(Transcript, p. 29).

8. In addition, respondent's attorney stipulated with respect to the memoranda in exhibit 4 that "there is no dispute that the documents reflect reimbursements by Ms. Snyder and that the dates of the actual reimbursements were not the dates that are reflected on the document but that, to the best of our knowledge, occurred in or about November of 2008." (Transcript, p.28).

9. At the time the IG interviewed respondent, which was prior to the fall of 2008, the IG had not yet received a copy of the memoranda or the deposit slip and, subsequent to the appearance of these documents, and respondent was not available to be interviewed due to health reasons (Transcript, p. 39-41).

10. Nonetheless, respondent was aware in June or July of 2008 that the IG had requested contracts and financial records from NYSTI, such as payments received by and made to NYSTI, as well as bank and credit card records (Transcript, pp. 25-26) but he was not informed that the IG may have been investigating Ms. Snyder and the possibility of financial wrongdoings at NYSTI, that the IG was going to

be investigating what reimbursements were made by Ms. Snyder (Transcript, p. 34-35) or that the IG wanted to investigate specifically the matters that are the subject of exhibit 4 (Transcript, p. 43). Indeed, Ms. Stevens admitted that no statement was ever made to Mr. Masaitis in any form or manner to indicate that the IG was interested specifically in matters related to Exhibit 4 (Transcript, p. 43).

11. In December 2004 NYSTI entered into a contract for snow removal with Gary Oliver (Transcript, p.45).

12. Also in December 2004 Beth Chromey, the business manager for NYSTI, had a conversation with Mr. Masaitis about issuing Mr. Oliver a 1099 tax form. She stated that she asked him if Mr. Oliver should receive a 1099 and that Mr. Masaitis said "yes" (Transcript, p. 48). Ms. Chromey also discussed a December 9, 2005 memo she had received from Ed Leach in which he wrote that he had a conversation with Mr. Oliver who stated that he would no longer do snowplowing because he was told he had to file a 1099 and Mr. Leach asks if this is from last year or a recent thing. In response Ms. Chromey handwrote a note, on the bottom of the memorandum, "Told him last year-But it has not been filed-Ben {Mr. Masaitis} said we can forego the 1099-so tell him {Mr. Oliver} it was not filed nor will it be" (Transcript, pp.50-51; Commission's Exhibit 7). Clearly, this statement by Ms. Chromey is at best hearsay; at worst it is testimony that was informed by reading the note on the exhibit and was not a present recollection of an actual conversation she had with the respondent. Thus, the exhibit containing the statement was admitted solely for the purpose of authenticity, i.e. that the statement was contained on the memo, but not for the truth of the statement, i.e. that Mr. Masaitis actually made that statement. Indeed, it is unclear from the handwritten note whether the "we can forego the 1099" phrase refers to the calendar year 2005 or 2004. The typed memo upon which the note is handwritten is dated December 9, 2005 but the sentence prior to the "we can forego the 1099" phrase states "told him {Mr. Oliver} last year but it has not been filed." Thus the record demonstrates a distinct lack of clarity with reference to what was said to whom by whom and when it was said with respect to the 1099s.

13. There was no written contract with Mr. Oliver and Ms. Chromey was unsure whether Mr. Oliver had executed a W-9 form, which is necessary in order to generate a 1099, nor was she aware if she had obtained a social security number from Mr. Oliver, which also would be necessary in order to issue the 1099 (Transcript, pp.54-55).

14. Mr. Oliver was paid by NYSTI as follows: \$675 dollars in calendar year 2004; \$1970 in calendar year 2005; \$1338.50 in calendar year 2007 (Transcript, p.58-59; Commission's Exhibits 8, 9, 10).

CONCLUSIONS OF LAW

Respondent is charged with three counts of knowingly and intentionally accepting and processing cash reimbursements with back-dated memoranda, one of which it is alleged he backdated himself, for personal expenses incurred by his supervisor, Ms. Snyder, to create false NYSTI financial records in violation of POL section 74(3)(d) {using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others} and POL section 74(3)(h){endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust}.

At first blush it is hard to see how the Budget Director of a state entity, whose responsibilities include maintaining "accounts receivable and accounts payable records," could violate the law by accepting payments made to him by a supervisor as reimbursements. Indeed, the Commission itself

admits that "Mr. Masaitis' acceptance of these cash reimbursements in and of themselves is not the issue" (Transcript p.7). Instead, the Commission argues, the violation occurred when respondent "processed" the reimbursements so as to make it appear as if they had been made contemporaneously with the events being paid for, rather than one or two years later. Yet, nowhere in either its argument or its proof does the Commission indicate exactly what constitutes the act of "processing." Certainly, processing a check, or cash, as the lay person understands the term, would include the ministerial acts of taking it from the individual offering payment, giving a receipt or making a notation of one and depositing the payment in a bank account. This is exactly what Respondent, in his position as the Budget officer of a state agency, did and it is hard to see how such routine processing could constitute a violation of the POL (Commission's Exhibits 4, 6).

Nonetheless, the Commission argues that these steps constitute a violation of the Public Officers Law for the following reasons: respondent was aware that the IG was investigating issues relating to finances at NYSTI; was aware that the events for which the reimbursements were being made occurred in October 2006 and October 2007; was aware that the date on the memoranda were inaccurate as they were dated November 3, 2006 and November 30, 2007 and one was undated; and knew or had reason to know that both the cash reimbursements and memoranda were being submitted, at least in part, for the purpose of misleading the IG. Even if such vague, general statements were supported in the record, it is by no means certain that such acts constitute a violation of the POL.

The mere fact that respondent was aware that the IG was investigating financial issues at NYSTI certainly cannot on its own give rise to, or even lend support to, an allegation that the law was violated. Clearly, the IG was at NYSTI in an effort to determine if, in fact, any laws were violated by the procedures under which and manner in which NYSTI conducted its financial life. Being aware of this investigation surely was an obligation of the respondent as the Budget Director of the institution in question and to find him liable for a violation based, at least in part, on this awareness seems misguided at best.

Even if this allegation is connected to the next two statements- that respondent knew that the events occurred one or two years prior to the reimbursements being made and that as a result the memoranda stating otherwise were inaccurate- no violation of law becomes apparent. While it may be preferable for reimbursements to be made promptly after an event occurs, it would not be outside the realm of possibility that Ms. Snyder simply neglected to make the payments and that her mind focused on this lapse only when the IG commenced its investigation. Likewise, while she surely was aware that she was not, in fact, making her reimbursements contemporaneously with the events to which they attach, the embarrassment of being tardy or neglectful might make even the most circumspect employee think about back-dating a memo. Hence, it is not possible to determine if Ms. Snyder was acting for the purpose of misleading the IG and, even if she was, the Commission introduced no evidence to substantiate its final contention that respondent was aware that this was indeed Ms. Snyder's motive, that he was well aware of such motive and that he acted as he did in order to aid and abet her in her in achieving her aim of misleading the IG. In any event, Ms. Snyder's actions and motives -ulterior or otherwise- are not our concern. There simply is no evidence in the record that the respondent, the one who is being charged here, was actively engaged in behavior that could be construed as using his official position to secure unwarranted privileges or exemptions for himself or others, even presupposing that an alleged attempt, by another, to mislead an investigation can be seen as such an unwarranted privilege or exemption.

It is true that one of the memoranda in exhibit 4 does contain a handwritten date that is approximately one year earlier than the actual date (which we do not accurately know as it is not clear when exactly these reimbursements were made, just that they were deposited in the bank on November 21, 2008) above the scrawled receipt and the respondent's signature, and it does not seem far-fetched to assume that respondent may have written that date himself. Nonetheless, again there is no support in the record for a finding that, even if he did so, it was part of a broader scheme to mislead- conceived of and carried out by someone other than respondent- and yet knowingly and intentionally supported by the respondent merely by possibly handwriting an inaccurate date.

Testimony at the hearing was elicited concerning the date and the receipt notes and while there was testimony by a NYSTI employee (Ms. Chromey, the business manager) that respondent wrote the notes, it is uncontroverted that what he wrote was not inaccurate, except for that one date- and there is no actual proof that he did, in fact, write it (Transcript, pp.53-54; testimony of Ms. Stevens of the NYS Inspector General's Office, pp. 35-38). Indeed, Ms. Chromey, who testified that she recognized respondent's handwriting, also stated that she did not know how that inaccurate date came to be placed upon that document, that she did not know if Ms. Snyder told respondent to write that date, that she was not present when respondent signed that memorandum and finally, "I'd say I don't know anything about this specific memo" (Transcript, p.55-57).) Hence, one can surmise or posit or allege that respondent wrote that year earlier date in an effort to aid and abet his supervisor in some nefarious scheme, but there is no actual proof to that effect. We were not made privy to any statement, exhibit or testimony by Ms. Snyder that she was, in fact, engaged in such a scheme and even if such evidence had been available there is no proof that respondent was aware of it and actively conspired with her in carrying it out. Indeed, it is just as likely that the date was written because respondent, having glanced at the typed date on that particular memorandum, merely dated the receipt for that same date.

The Commission attempts to rest its entire case on a letter which was sent by respondent's attorney to the Commission in which the attorney states that "Mr. Masaitis was requested by Ms. Snyder to accept the reimbursements for these personal expenditures and to place the dates indicated on the related documentation" (Commission's Exhibit 5). Even assuming that a letter written by an attorney, which is not created under oath and which may contain factual inaccuracies, may somehow create liability for a client, the mere placing of the date on the memo, even if carried out by respondent at Ms. Snyder's request, fails to support the Commission's allegation that the late reimbursement was part of a scheme- by a third party for her own benefit- to mislead the IG and that respondent knowingly and intentionally participated in such a scheme. Indeed, if proof existed that Ms. Snyder was engaged in such behavior, either from testimony, documentary evidence or allegations of statutory violations commenced against her, it is likely that such proof would have been included in the record of this proceeding. Without such support for the Commission's allegations that she was involved in a deliberate attempt to mislead (again assuming that such attempt would create an unwarranted privilege in accord with section 74(3)(d) of the POL) there simply is no support for allegations that respondent's actions were part and parcel of said attempt.

The Commission next attempts to create such proof by asking Ms. Stevens (the IG's investigative assistant in the NYSTI matter) what response Ms. Snyder made to questions about the reimbursements and the memoranda in Exhibit 4. Ms. Stevens replied that Ms. Snyder initially stated that the reimbursements were made at the time they were dated (Transcript, p. 32) and later the Commission's counsel, in her closing statement at the hearing, stated that accordingly the only reasonable purpose of backdating the memoranda was to mislead the IG by creating an impression that the reimbursements had been made at an earlier date (Transcript, p.66). Counsel next states that turning a blind eye to Mr.

Masaitis' actions would be "giving carte blanche to other state officers and employees that they can be dishonest with investigatory agencies" (Transcript, p. 67) thereby tainting respondent with the brush of the allegedly dishonest acts of his boss. Mr. Masaitis not only becomes the scapegoat for Ms. Snyder's actions but, it is argued, is likewise liable solely because of her actions. This is a bootstrapping argument designed to hold a subordinate responsible for alleged wrongdoing committed by another who, herself, is not the subject of this or any other hearing, and it's an argument that is supported solely by the hearsay testimony of an investigative assistant in the IG's Office, who testified to a statement purportedly made by Ms. Snyder but not supported either by Ms. Snyder testifying at the hearing or by the entry in the record of a transcript from the IG's interview with her.

Even if this argument had merit, in order for liability to be imposed upon respondent the Commission must prove that his actions constituted the use or attempted use of his official position "to secure unwarranted privileges or exemptions for himself or others" and/or rise to a course of conduct that demonstrates "a violation of his public trust." First, there simply is no course of conduct created by the mere acceptance, at one time, of the three reimbursements. This acceptance of the three memoranda was a single, one-time event and such behavior cannot constitute a course of conduct because there were no multiple acts and no regular or continuing behavior that could reasonably be recognized as a course of conduct.

Likewise, the privilege alleged by the Commission and granted to Ms. Snyder purportedly arose when respondent took "actions to assist Ms. Snyder in her attempt to thwart the IG investigation" (Transcript, pp. 7-8). It is by no means clear that Ms. Snyder's alleged scheme to mislead or thwart the IG constitutes such a privilege or exemption. Ms. Snyder reimbursed NYSTI for some personal expenses, and she did so quite a while after those expenses were incurred. For some reason-perhaps to thwart the investigation, or perhaps from poor record-keeping- she submitted her reimbursements in a manner designed to make it appear that she had made them at an earlier date. The record provides no indication of her rationale for that behavior and so it becomes mere supposition to assume that she did so to thwart an official investigation. Indeed, the fact that there was no direct evidence about Ms. Snyder or from her at the hearing and no evidence showing that Ms. Snyder was ever charged with obstructing justice or hindering an investigation does not support a finding that she intended to impede the IG. Considering that Mr. Masaitis did not work for the IG and had no official position which would enable him to influence the IG's discretion to recommend charges against Ms. Snyder thereby granting her the privilege of not being charged with wrongful acts which she intended to commit, it appears that she received no "privilege" whatsoever from Mr. Masaitis. Furthermore, it stretches credulity to suppose that the word privilege-generally seen as a specific right - can be argued to include respondent's actions.

The remaining charges against Mr. Masaitis stem from dealings he had with a snow plow operator who was hired by NYSTI and similar problems exist here. The Commission alleges "that in 2004, 2005 and 2007 Mr. Masaitis instructed his subordinate, Beth Chromey, not to issue the required 1099 federal tax forms to a snowplow contractor hired by NYSTI", thus allowing the contractor the opportunity to hide income from the IRS. However, once again there is no evidence of what specific privilege or benefit respondent is supposed to have conferred on Mr. Oliver by not giving him a 1099, particularly under circumstances where it appears NYSTI had neither a properly executed W-4 form from Mr. Oliver nor his Social Security number, each of which is required in order for an employer to issue a 1099. It certainly plausible to suggest that Mr. Oliver may have intended not to pay his taxes for the years in which he was paid for snow-plowing, but there is no evidence to that effect. Indeed, it is equally plausible to suggest that he did, in fact, pay taxes on the amount of money he earned in each of

the years he plowed. Nonetheless, the point is that there is simply no evidence that a benefit or privilege was conferred on him merely because he did not receive a 1099, which could not be issued because NYSTI lacked the required information to issue one.

Of course, NYSTI could have fired Mr. Oliver for not supplying them with the necessary information thereby eliminating the 1099 problem, but should another snow-plow operator not be immediately available, that step would have resulted in the organization creating a potential dangerous situation for patrons and passersby for which NYSTI, and NYS, might have incurred liability. Indeed, while Mr. Masaitis was the Budget Director for NYSTI, it is not at all clear if he would have had the authority to fire Mr. Oliver. He was responsible for the paperwork associated with employees, but nothing in the record indicates whether he could have alleviated the 1099 situation by terminating Mr. Oliver's employment. Hence, Mr. Masaitis was between a rock and a hard place: continue to retain Mr. Oliver as the snow-plow operator but without the documentation necessary to issue 1099s or make a recommendation to whomever had the authority within NYSTI to hire and fire to terminate his employment- a recommendation he could not assume would be followed especially if there was any doubt about finding a likely replacement. In either case, there is insufficient evidence to prove that Mr. Masaitis violated the Public Officers Law merely by failing to issue a 1099 when the agency lacked the prerequisite information and when there is simply no information in the record relative to what recourse respondent had to rectify the situation, even assuming that such a failure to issue a tax form constitutes the granting of an unwarranted privilege or demonstrates a course of conduct that would raise suspicion that Mr. Masaitis violated his public trust.

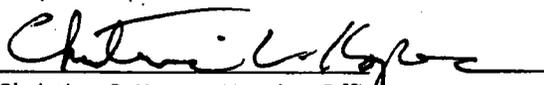
Finally, as it is not at all clear when it was determined that Mr. Oliver would not get a 1099, and by whom that determination was actually made it is not possible to conclude that Mr. Masaitis engaged in a "course of conduct" with respect to these forms. Indeed, the only testimony regarding the 1099s is from Ms. Chromey and while her conversation with Mr. Masaitis occurred in December 2004, it is not clear whether it referred to calendar year 2004 alone, 2004 and 2005, or 2005 alone and there is absolutely no testimony with respect to 2007 and the 1099. Thus, once again it appears that Mr. Masaitis was a convenient scapegoat for inadequate procedures within NYSTI, a situation for which he cannot be held solely responsible, and one that certainly cannot not give rise to violations of the Public Officers Law.

The Commission has the burden of proving the Respondent knowingly and intentionally violated the Public Officers Law. As the record contains insufficient evidence of such violations, and a decided lack of prove that any actions taken by respondent were committed with the requisite intent, no violation is found.

RECOMMENDATION

As no violation has been found, no penalty is recommended.

Respectfully submitted:


Christine C. Kopec, Hearing Officer