NOTIFY 9/20

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO. 2184CV02474-B

JEFFREY FOURNIER,

Plaintiff

vs.

COMMONWEALTH OF MASSACHUSETTS,
STATE ETHICS COMMISSION,

Defendant

Notice Sent 9/21/22 (2)DC

MEMORANDUM OF RULING ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS (Papers 7 & 8)

Pro se Plaintiff Jeffrey Fournier, a former consultant for the Office of the State Auditor (OSA), seeks G.L. c. 30A review of Defendant State Ethics Commission's (Commission) decision of September 29, 2021 (Decision). The Commission found Fournier violated G. L. c. 268A, §§ 4(c) and 23(b)(2)(ii), when he communicated on behalf of his private business with the state's Department of Children and Families (DCF) and Office of the Child Advocate (OCA), to offer his business's services to those state agencies. Following hearing on July 20, 2022, review of the full record, and for the reasons that follow, Fournier's Motion for Judgment on the Pleadings (Paper 7) is **DENIED**, and the Commission's Cross-Motion (Paper 8) is **ALLOWED**.

Relevant Background Facts of Record

The following is taken from the Administrative Record (AR), including the Commission's factual findings and rulings of law. AR 1177-1200.

Fournier's Work at OSA

In November 2011, OSA issued a Request for Responses (RFR) looking for an IT Project Manager. AR 1178. The RFR specified that the candidate have "experience working in an

environment where IT services multiple applications that span many divisions in an organization," and also required that the candidate have a "minimum of five years' experience working on projects sponsored by the Commonwealth of Massachusetts." AR 1178, quoting AR 670.

After a competitive hiring process that included review of applicants' resumes and follow-up phone calls, OSA hired Fournier based, in part, on his prior work experience at the Executive Office of Health and Human Services (EOHHS), where he was a project manager consultant for six years. AR 1178. In that prior position, Fournier had gained specialized knowledge related to Medicaid data warehousing. AR 1178.

OSA hires IT consultants through approved vendors who have entered into statewide contracts. AR 1179. One such contract, the so-called "Cat2B" contract, is used when an agency has "independently located an individual ('Resource') they wish to retain," and the individual already has an "employer." AR 1179, quoting AR 685-686. Under the Cat2B contract, the approved vendor subcontracts with the individual's "employer." AR 1179, quoting AR 686. Typically, the agency first negotiates a pay rate with the individual it wishes to hire, and then allows the individual to choose a Cat2B vendor to work with. AR 1179. See also AR 688.

Fournier was a W-2 employee of his own company, Jakal Consulting, Inc. (Jakal). AR 1179. Jakal subcontracted with McInnis Consulting Services, Inc. (McInnis), an approved Cat2B vendor. AR 1179. OSA, in turn, entered into a Statement of Work (SOW) with McInnis for Fournier's services. AR 1179. The SOW identifies Fournier as a "Consultant" and states that Fournier is personally responsible for performing duties including: providing project management recommendations and best practices; managing and/or mentoring OSA resources; facilitating meetings with business and IT staff, and all levels of management; and transferring

knowledge/expertise to others within OSA and externally. AR 1179. The SOW incorporates the terms and conditions of the Cat2B contract. AR 1179. It also states that "[t]he Consultant (or Resource) is provided to the [OSA] in compliance with the terms of the Contract" and that "[a]t no time shall the Resource be considered an employee of the Agency [OSA] or the Commonwealth." AR 475.

While at OSA, Fournier oversaw the development and implementation of a six-year Technology Roadmap that outlined nineteen major technology projects, supervised nine full-time employees, hired and managed twenty-four contracted staff, created project contracts and statements of work, and oversaw bid review and vendor selection. AR 1178-1179, citing AR 453 (Fournier's Resume). Fournier worked out of OSA's offices and was issued a state identification card. AR 1179. He reported to OSA's Chief Information Officer. AR 1179.

In November 2015 and November 2016, Fournier signed Acknowledgments of Receipt of the Conflict of Interest Law Summary for state employees. AR 1179. Fournier also completed the Conflict of Interest Law online training program for state employees in June 2015 and November 2016. AR 1179.

On November 30, 2017, Fournier's supervisor gave Fournier notice that his job would end December 13, 2017. AR 1180. Shortly thereafter, the termination date was extended to January 13, 2018. Id.

The DCF Audit

On December 7, 2017, OSA published an Official Audit Report of DCF (Audit Report). AR 1180. Fournier did not work on the Audit Report. AR 1181.

The Audit Report found DCF failed to "effectively identify and investigate all occurrences of serious bodily injury to children in its care" and recommended that "DCF ...

establish policies and procedures that require its staff to routinely monitor MMIS [Medicaid Management Information System] data to ensure that it [could] identify, and investigate as necessary, medical occurrences that appear[ed] to be critical incidents involving children in its care." AR 1180, quoting AR 486. In response to the Audit Report, DCF indicated it would determine the feasibility of using MMIS data but noted that, given that the data was several months old at the time of its availability to DCF, the data could only serve as an after-the-fact quality indicator. AR 1180.[1]

The Audit Report also found that "DCF does not report all critical incidents affecting children in its care to the Office of the Child Advocate." AR 1180, quoting AR 486. DCF agreed that its process of reporting critical incidents to OCA needed to be improved. AR 1180-1181.

On the day the Audit Report was published, Fournier sent an email to his wife including links to two news articles about the Audit Report's findings and stating, "Ya Baby!! We're in the $$$$$$. Just a matter of time." AR 1181, quoting AR 520. His wife replied, "GREAT! help out those kidos [sic]!" AR 1181, quoting AR 520. Fournier explained to an unintended recipient of the email that it was about software "we've developed" and were closer to commercializing because the audit results had been published. AR 1181, quoting AR 520. At that time, Fournier and two OSA co-workers, Brian Scheetz and Sanjay Shah, operated a company named Riscovery, Inc. (Riscovery), incorporated in 2014, which provided risk analysis services. AR 1180.

Fournier's Outreach to Ryan FitzGerald at DCF and Melissa Williams at OCA

Fournier believed Riscovery could address the issue DCF highlighted in its response to

[1] The Auditor disagreed with DCF's characterization of the timeliness of the data. AR 1180.

the Audit Report regarding the timeliness of the MMIS data. AR 1181. See also AR 430, 437, 240. On or about December 11, 2017, Fournier left a voicemail message for Ryan FitzGerald, the Chief of Operations and Organizational Improvement for DCF. AR 1181. In the voicemail, Fournier introduced himself as "a consultant at the State Auditor's Office" and stated:

> [T]he last six years I've been working as a project manager helping [the OSA] develop their data warehousing and risk analytic solutions for auditing as part of their capital bond projects. Myself along with two other individuals at the OSA are the primary architects of the data warehousing and software solution that was used in the recent audit that essentially used the Medicaid data to analyze and report on children at risk. And prior to our work at the OSA, Sanjay Shah, one of the individuals I just mentioned, he and I previously worked at [EO]HHS as project PM's on the MMIS data warehouse solution, the new as well as the previous data warehouse. So we know Medicaid data and warehousing quite well. And knowing that the audit was coming to an end and recognizing that there is no market solution available, we have teamed with the OSA's current director of data analytics, Brian Scheetz, who's the actual architect and developer of all the OSA's risk analytics software to re-engineer the audit software to be more DCF focused, more case management and caseworker friendly. And we'd like to show you what we've done on this, specifically the work that we've done on the audit, and how we've translated that or re-constituted that solution to work for DCF to fit your needs, and we were wondering if we might be able to show you a solution and set the time to demonstrate some of our capabilities. . . . I think we can really help you. It will be much cheaper, much faster than I think anyone has anticipated. We've done this, we know how to do it, and we'd like to show you that solution.

AR 1181-1182, quoting AR 536 (recording).

FitzGerald receives many calls from IT companies pitching products. He often does not return those calls. AR 1182. When FitzGerald may be interested in a product, the matter is usually referred to IT personnel for an initial call. Fournier's voicemail struck FitzGerald as odd and felt like a sales call. Id. FitzGerald was concerned that state employees could be using a tool developed for the public audit for their own financial gain. FitzGerald brought the voicemail to the attention to the DCF leadership team, including the DCF commissioner. Id. They discussed the possibility that OSA had asked Fournier to call FitzGerald about the audit and offer support, and decided FitzGerald would return Fournier's call. Id.

During the return call, FitzGerald and Fournier discussed Fournier's background and experience (including his prior work at EOHHS), his knowledge of Medicaid data, and the background and experience of Fournier's Riscovery colleagues. AR 1182. They also discussed problems associated with using the MMIS data, and Fournier explained that "they had refined . . . the tool that had been used in the audit" to make the data more useful. Id. Fournier offered to show Fitzgerald what Riscovery had done. Id.

On December 13, 2017, Fournier sent a follow up email to FitzGerald from his Riscovery email address, copying his own OSA email address and the Riscovery email addresses of Shah and Scheetz. AR 1182. The subject line of the email read: "DCF Medicaid Audit Software: Riscovery Jeff Fournier." AR 528. The email states:

> As I mentioned during our conversation, Brian and Sanjay have been instrumental in the development of the network infrastructure, architecture and warehousing platforms, database designs, and risk analytics software used by the [OSA] in performance of its oversight and auditing functions. It's been the culmination of a six year Capital Bond project across a multitude of technologies and data domains, which I have had the pleasure to help manage along the way. These capabilities and tools were used on the recent DCF audit to identify children at risk using Medicaid Claims data.
>
> Knowing that the DCF Audit was coming to an end and recognizing that there is no market solution currently available, the three of us teamed to re-engineer the underlying architecture, database design, and the software solution to be more DCF focused, more Case Management and Social Worker friendly. It is in no way a finished product from a DCF perspective, we don't know your specific requirements, but it is a solution that can be of almost immediate help in the identification of children at risk and affording DCF a more proactive approach to risk mitigation.
>
> We would like to talk with and show the DCF leadership team what we have done, and what can be done in this space to offer a realistic, affordable, timely solution to this emerging and urgent need.

AR 528.

During this same time period (mid-December 2017), Fournier also began communicating with Melissa Williams, Program Coordinator for OCA.[2] The OCA office is located in the same building as the OSA office. AR 1179, 1183. Members of the public do not have access to OCA office space, and a member of the public who wants to contact OCA would first need to speak to an executive assistant, who would then call to notify Williams that someone from the public was seeking to contact OCA. AR 1183. Any member of the public who wished to speak to OCA, or members of another state agency arriving for a meeting, would be met in the office lobby. Id.

However, Fournier approached Williams at her cubicle inside OCA, identified himself as working for the OSA, and asked her to set up a meeting with the Child Advocate about the recent audit. AR 1183. After Fournier left, Williams notified her direct supervisor, as well as the Child Advocate, that someone from OSA wanted to set up a meeting. Id.

On December 12, 2017, Fournier sent a follow-up email to Williams from his Riscovery email address that copied the Child Advocate with the subject line "Riscovery: Using Medicaid Data to Identify Children at Risk." AR 525. See also AR 1183-1184. The email stated:

> As I mentioned, I have been a consultant at the State Auditor's office for the last six years and a few of us have been working on developing their data warehousing and risk analytic solutions as part of their Capital Bond technology project. We are the primary architects of the data warehouse and software solutions used in the recent Audit that used Medicaid data to analyze and report on Children at risk. We understand that there are some issues with the period of claims data used in the Audit, but the underlying principle, methodology and ability to assess and identify children at risk through Medicaid Claims data is un-deniably powerful and is a proven approach. We did it and we can do it for claims data that is 2 days old, not two years like it was in the Audit.
>
> Knowning [sic] that the Audit was coming to an end and recognizing that there is no market solution available, we have re-engineered the Audit Software to be more DCF focused, more Case Management and Case Worker friendly. Every day the case worker would log into the App and see what their assigned children's risk portfolio looks like

[2] The Office of Child Advocate provides independent oversight of state services for children. It identifies gaps in state services and recommends improvements in policy and practice. The Child Advocate is the administrative head of the office. G.L. c. 18C sections 2-3.

> with Alerts, Scores, Medical Histories, Notifications, Visualizations, etc. based on days old data. Not weeks, months, or years old.
>
> We have formed a company, Riscovery, Inc., and would like to show you what we've done at the State Auditor's Office and how we have re-constituted the software to work for DCF and fit their needs. We have an affordable, incredibly powerful and effective solution available right now. We were hoping to show the Child Advocate our work so she can be more informed as to the overall validity and capability of this novel approach and our combined abilities to help these children almost immediately.
>
> We'd very much appreciate an audience with the Child Advocate . . . to demonstrate the software. We were hoping you could assist us with that effort.

AR 525-526.

Fournier sent additional follow-up emails to Williams from his Riscovery email address. In one such email, he also copied his OSA email address as well as the Riscovery email addresses of Scheetz and Sanjay. AR 1184.

On or about December 13, 2017, the EOHHS Secretary met with the State Auditor and complained about Fournier's communications with DCF. AR 1184. As a result, on December 21, 2017, OSA's General Counsel and HR Director spoke with Fournier about the December 13, 2017 email to FitzGerald, indicating that the email had created the appearance of a potential conflict of interest. AR 1184. During the December 21, 2017 meeting, Fournier resigned his job at OSA. AR 1184.

On December 29, 2017, Fournier left a voicemail for FitzGerald in which he explained he had resigned from his position at OSA, stated he had removed any appearance of a conflict of interest, and apologized for any discomfort he had created. AR 1183. Fournier further stated that, if FitzGerald or DCF remained interested, "we [Riscovery] certainly would be interested in speaking with you and showing you what we've done. And I think you'll be impressed with our capabilities." AR 1183, quoting AR 537.

A meeting was never held with DCF. AR 1183. However, a meeting with the Child Advocate took place on January 3, 2018. AR 1184.

Commission Proceedings

On June 23, 2020, an Order to Show Cause was filed against Fournier by the Assistant Enforcement Counsel of the Commission as petitioner, alleging Fournier violated G. L. c. 268A, §§ 4(c) and 23(b)(2)(ii).[3] AR 1. Section 4(c) provides:

> No state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

G. L. c. 268A, § 4(c). Section 23(b)(2)(ii) provides:

> No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know … use or attempt to use [his/her] official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals[.]

G. L. c. 268A, § 23(b)(2)(ii).

An adjudicatory hearing was held on April 26, 2021, at which Fournier represented himself. AR 1178. The Commission issued its Decision on September 29, 2021, concluding that it enforcement arm had proved by a preponderance of the evidence each element of the allegations that Fournier had violated G. L. c. 268A, §§ 4(c) and 23(b)(2)(ii). AR 1177, AR 1200.

In ruling against Fournier, the Commission first determined that, although he was a consultant to OSA, Fournier was a state employee for purposes of G. L. c. 268A, §§ 4(c) and

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[3] Doe v. State Ethics Comm'n, 444 Mass. 269, 271-272 (2005)("An investigation by the commission occurs in three distinct stages).

23(b)(2)(ii). AR 1185-1187. It then concluded Fournier violated § 4(c) because he acted as an agent for Riscovery in connection with a particular matter -- namely, the finding in the OSA Audit Report that DCF should monitor MMIS data -- in which OSA, DCF, and OCA each had a direct and substantial interest. AR 1187-1192. The Commission further found Fournier violated § 23(b)(2)(ii), because he knowingly or with reason to know used his position as an OSA consultant to gain access to DCF and to OCA, for the purpose of promoting Riscovery, which was an unwarranted privilege of substantial value not properly available to similarly-situated public individuals/businesses who might seek to pitch their IT services to those agencies. AR 1192-1198.

Notwithstanding its findings of violation, the Commission declined to assess a civil penalty against Fournier based on the presence of certain mitigating factors, including Fournier's own interpretation of legal advice received from OSA, and the fact that neither Fournier nor Riscovery obtained any paid work as a result of the violations. AR 1198-1200.

Applicable Scope of Review

Judicial review of the Commission Decision is governed by G. L. c. 30A, § 14. A reviewing court is confined to the administrative record and may not make a de novo determination of the facts, make different credibility choices from the agency, or draw different inferences from the Commission's findings of fact. McGovern v. State Ethics Comm'n, 96 Mass. App. Ct. 221, 227 (2019). Moreover, the court must "give due weight to the experience, technical competence, and specialized knowledge of the [Commission], as well as to the discretionary authority conferred upon it," G. L. c. 30A, § 14 (7), and accord the Commission "substantial deference in its reasonable interpretation of" G. L. c. 268A, the statute it is charged with enforcing. Id., quoting Sikorski's Case, 455 Mass. 477, 480 (2009). A court's evaluation

of an agency decision is limited to "whether [it] is supported by substantial evidence, free from error or unlawful procedure, and consistent with its statutory and discretionary authority." Id.

Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). The court has a responsibility to review the sufficiency of the evidence, and to "take into account whatever in the record fairly detracts from the supporting evidence's weight." Cobble v. Comm'r of Dept. of Social Services, 430 Mass. 385, 390 (1999). It is the "formidable burden" of plaintiff Fournier to demonstrate the Commission's decision is invalid, Ten Local Citizen Groups v. New England Wind, LLC, 457 Mass. 222, 228 (2010), either for lack of substantial evidence or because the agency's interpretation of its own rules is not rational.

Discussion

Fournier maintains the Commission's determination that he was a state employee for purposes of G. L. c. 268A, §§ 4(c) and 23(b)(2)(ii), and its Decision that his conduct violated each of those statutes was not based on substantial evidence, and/or constituted an error of law. Applying the standard discussed above, I rule otherwise.[4]

Fournier's Status as a State Employee

By their terms, §§ 4(c) and 23(b)(2)(ii) apply only to "state employees." Chapter 268A defines a "state employee" as any person "performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council."

[4] I address only those among Fournier's numerous arguments which I determine justify explicit discussion, after having carefully considered the merits of each.

G. L. c. 268A, § 1(q). The Commission has interpreted this definition broadly, concluding that it includes "anyone doing work for the state, including so-called 'independent contractors,'" and "consultants who provide services on an intermittent basis, whether or not they receive compensation." State Ethics Commission Conflict of Interest Advisory Opinion (EC-COI)-99-7.

Notwithstanding this broad interpretation, the "Commission has recognized there are situations where the connection between an individual and the state agency is too remote to warrant state employee status" and has "previously held that a contract between a state or municipal agency and a corporation does not generally operate to bring employees of the corporation within a definition of public employee." Id. (internal quotations omitted). As such, the Commission has established certain factors to determine when an employee of a private business entity should be deemed a state employee for purposes of the conflict of interest law. Id. These factors are:

1. whether the individual's services are expressly or impliedly contracted for;
2. the type and size of the corporation;
3. the degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to that agency;
4. the extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and
5. the extent to which the person has performed similar services to the public entity in the past.

EC-COI-89-35. No one factor is dispositive; the analysis is based on the totality of circumstances. Id. The Commission's finding that Fournier was a state employee for purposes of G. L. c. 268A based on these factors is substantially supported by the Record. AR 1186.

Fournier challenges the application of the five-factor test overall, arguing it is not found in the statute itself, there are no standards for its application, and the test is not found in any training materials. Paper 7 at pages 7, 22. This argument is unavailing. The Commission

possesses considerable discretion to interpret and to apply the statute it is charged with enforcing. The adoption of the five-factor test represents a reasonable exercise of that discretion. Moreover, the Commission's repeated use of the test in its publicly-available enforcement decisions and advisories provides both notice of and guidance to its application. Opposition, Paper 8 at pages 8-12. Also important, OSA required Fournier to sign Acknowledgments of Receipt of the Conflict of Interest Law Summary for state employees, an abundantly clear signal that, regardless of his own views on or notice of the five-factor test, the conflict of interest law could potentially be applied to his work.[5]

With regard to Factor 1, there was evidence OSA expressly contracted for Fournier's services through the SOW, which incorporates the terms of McInnis' Cat2B contract with the state. The SOW identifies Fournier as the "Consultant" who will provide services to the OSA. Moreover, the OSA (and not McInnis) reviewed Fournier's resume, conducted a follow-up phone call with him, and chose him over other candidates.

Fournier argues the Commission's conclusion is inconsistent with its own Summary of the Conflict of Interest Law for State Employees. Paper 7 at pages 5-6, 22; Paper 9 at page 2. The Summary provides:

> Are you a state employee for conflict of interest law purposes?
>
> You do not have to be a full-time, paid state employee to be considered a state employee for conflict of interest purposes. **Anyone performing services** for a state agency or holding a state position, whether paid or unpaid, including full- and part-time state employees, elected officials, volunteers, **and consultants**, is a state employee under the conflict of interest law. **An employee of a private firm can also be a state employee, if the private firm has a contract with the state and the employee is a "key employee" under the contract, meaning the state has specifically contracted for her services.**

[5] To the extent Fournier argues the factors are impermissibly vague (Paper 7 at pages 1, 6), I cannot agree.

AR 1187, n.8 (emphasis supplied). Fournier points out that he was employed by Jakal, which subcontracted with McInnis, and not the state.

Read in isolation, the last sentence relied upon by Fournier is indeed somewhat confusing, in that it could be read to imply that an employee of a private firm will only be considered a state employee if that firm has a contract with the state. However, this is merely one possible reading, and the preceding language, which includes a reference to "consultants," makes clear that a state employee for purposes of the conflict of interest law includes individuals in a variety of situations, including those not specifically described.

Fournier also argues that because OSA labelled him an independent contractor and treated him as such, the Commission's application of the five-factor test is inconsistent with the independent contractor statute, G. L. c. 149, § 148B, and the "IRS SS-8 Test." Paper 7 at pages 1-2, 7, 19-20; Paper 9 at page 7. However, as the Commission properly ruled, the broad definition of state employee in the conflict of interest statute makes clear that an individual may be considered an employee for its purposes, even though that would not be the case under labor, employment, or taxation law. G. L. c. 268A, § 1(q). There is nothing inherently problematic with the word "employee" holding different meanings. The aim of the independent contractor statute in ensuring fair compensation is different from the conflict of interest statute ensuring the integrity of government processes. There is likewise nothing inherently problematic in the fact that Fournier was considered an independent contractor for purposes of compensation and benefits, but an employee for the purposes of the conflict of interest law. Accordingly the SOW and other hiring documents are not dispositive to this analysis as a matter of law.[6]

[6] Fournier has asserted Factor 1 is inapplicable because OSA did not specifically contract for his services, (Paper 7 at pages 3-5; Paper 9 at pages 2-3), pointing to: the distinctions made between independent contractors and contract employees in hiring guidance documents (AR 620, 685); the Commonwealth's Employment Status and Standard Contract Forms (AR 667-668); and the SOW (AR 683, 698).

In short, Fournier's Factor 1 argument fails because there was substantial evidence before the Commission to conclude that the circumstances as a whole, including the manner in which he was selected by OSA, demonstrated OSA had contracted for Fournier's services.[7] EC-COI-86-21 (Commission should not elevate form over substance when determining whether entity has a contractual relationship with the state).[8] I am unable to read the documents cited by Fournier to preclude the Commission's conclusion regarding Factor 1, as a matter of fact of law.

With regard to Factor 3, there was substantial evidence Fournier's services provided under the SOW were not ministerial or routine, but rather required specialized knowledge and expertise that implicated the exercise of discretion and judgment. EC-COI-87-8.[9] Fournier not only held managerial duties, but was also responsible for high-level development of a "technology roadmap" for the OSA. AR 453. Fournier's Factor 3 argument also fails because the nature of his duties as described in the SOW, and the work he actually performed as reflected in his resume, support the Commission's conclusion. Contrary to Fournier's contention, (Paper 9 at pages 3-4), there was no error in the Commission's consideration of his resume for purposes of the Factor 3 analysis, given Fournier indisputably created the document, and the obvious probative value it held for understanding his duties at the OSA. The Commission was not required to restrict its analysis to the SOW.[10]

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[7] Fournier suggests the Commission unfairly relied on the fact that the SOW named him as a consultant in determining Factor 1 applied. Paper 7 at pages 2, 6. I disagree, and note that the Commission did not rely on this fact alone.

[8] Fournier argues the Commission erred because it failed to consider that EC-COI-86-21supports his contention he was not an employee. Paper 7 at pages 1, 7-8. I do not agree with Fournier that the existence of this advisory opinion required the Commission to arrive at the determination he seeks in his case.

[9] Fournier argues he did not have the requisite specialized knowledge, but was merely engaged in routine project management practices. Paper 7 at pages 1, 19; Paper 9 at pages 3-4. These contentions lack merit as a matter of Record.

[10] I am not persuaded by Fournier's argument about the Niche Vendor Contract. Paper 9 at page 4.

With regard to Factor 4, there was evidence Fournier personally performed the services as outlined in the SOW. He drove the progress and development of a number of OSA technology projects, personally hiring and managing OSA personnel as well as selecting vendors. AR 453. With regard to Factor 5, there was evidence Fournier had performed similar services for the state in the past; prior to his tenure at the OSA, he worked for six years at EOHHS involving a similar area of expertise. AR 454.

Last of all, Fournier argues he should not have been considered a state employee because he had received a notice of termination prior to his communications with DCF and OCA, and was therefore properly pursuing a potential employment opportunity. Paper 9 at page 2. This argument is also unavailing. As recognized by the Commission, a notice of termination is not the same thing as a termination. A.R. 1187. Prior to actual termination from performing services for the state, Fournier's obligations under the conflict of interest law remained in effect.

Violation of G. L. c. 268A, § 4(c)

To establish Fournier violated G. L. c. 268A, § 4(c), the Commission was required to find, by a preponderance of the evidence, that Fournier was a state employee, and also that he: (1) while not in the proper discharge of his official duties; (2) acted as agent for someone other than the Commonwealth or a state agency; (3) in connection with a particular matter; (4) in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Fournier contends the Commission erred when it concluded OSA's recommendation that DCF should monitor MMIS data was a particular matter, and that the recommendation was of direct and substantial interest to DCF, OCA, and the OSA. Paper 7 at pages 10-16; Paper 9 at pages 5-6. Fournier further argues the Commission's determination he violated § 4(c) infringes on his constitutional right to free speech. Paper 7 at pages 18-19; Paper 9 at page 6. I disagree.

Chapter 268A defines "particular matter" as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, **determination**, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G. L. c. 268A, § 1(k)(emphasis supplied). Interpreting this definition, the Commission has concluded "[e]ach decision or determination made by a state agency" constitutes a "particular matter unless an exemption applies." EC-COI-89-8. Based on the expansive definition in G. L. c. 268A, the Commission reasonably found here that OSA's recommendation was a determination as to what actions DCF should take to resolve the issues subject to the Audit Report, and therefore a particular matter. Flemings v. Contributory Retirement Board, 431 Mass. 374, 375 (2000)(where agency's statutory interpretation is reasonable, the court should not supplant it).

Fournier maintains the term "particular matter" connotes only the formal exercise of government power and "official acts." Paper 7 at pages 10-13; Paper 9 at pages 5-6. He points out DCF was not obligated to follow the recommendation, and characterizes it as a mere suggestion or opinion. This argument is unavailing. The recommendation was an official act of an executive agency, and thus an exercise of government power.[11] It was a formal administrative determination made pursuant to laws granting OSA authority to audit state agencies. G. L. c. 11, § 12. See also art. 17 of Amendments to Mass. Const. (Auditor is Constitutional officer). The Commission's particular matter conclusion is not an error of law and thus is properly upheld.[12]

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[11] The statute separately defines "official acts" and "particular matters." An official act is defined as "any decision or action in a particular matter or in the enactment of legislation." G. L. c. 268A, § 1(h). The term "official act" is not included in the definition of "particular matter" or § 4(c).

[12] Fournier also argues the Commission's application of the term "particular matter" in his case renders the statute uncertain or impermissibly vague and violates due process. Paper 7 at pages 1, 14. I discern no basis for this contention.

The same is true for the Commission's conclusion that OSA, DCF, and OCA had a direct and substantial interest in the recommendation. The Commission could reasonably so conclude. OSA made the recommendation. The practices of DCF and OCA were its focus, and those practices implicated their respective responsibilities.

Fournier argues DCF's lack of a substantial interest is evidenced by the fact that no action has been taken to date to implement the recommendation. Paper 7 at page 14. However the Commission properly concluded that its focus belonged on the interest the state agencies possessed at the time Fournier engaged in his communications with them. At that time, DCF's consideration of OSA's recommendation and its impact on DCF's own practices demonstrate the state agencies held a direct and substantial interest in the matter. This is true even if, as Fournier points out (Paper 7 at pages 15-17), DCF and the Governor disagreed with, or were skeptical about, the efficacy of monitoring MMIS data.

Lastly, Fournier's contention that the Commission's Decision infringes on his First Amendment rights is without merit. Paper 7 at pages 1, 18-19; Paper 9 at page 6. Supreme Judicial Court precedent indicates otherwise. In a decision involving the sister statutory provision for municipal employees in section 17(c), the Court explained:

> The State conflict of interest law restricts conduct, not speech or expression. Although the conduct regulated by G.L. c. 268A includes both "speech" and "nonspeech" elements, the purpose of the statute is entirely unrelated to the suppression of free expression. Any incidental limitation of First Amendment freedoms is clearly justified by the Commonwealth's substantial interest in regulating the conduct of public officials.

Zora v. State Ethics Comm'n, 415 Mass. 640, 651 (1993).

Violation of G. L. c. 268A, § 23(b)(2)(ii)

Section 23(b)(2) provides:

> No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know . . . (i) solicit or receive anything of

> substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's **official position**; or (ii) use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals[.]

(emphasis supplied). Fournier contends the Commission erred in concluding he used an "official position," because he was not in a position of authority, but was rather a mere consultant with no power to make any decisions or commitments on behalf of the OSA. Paper 7 at pages 1, 17-18; Paper 9 at page 7. I disagree. Read plainly and in the context of the entirety of the statute the provision is not so restrictive, and the Commission did not err in considering whether Fournier improperly used his position as a consultant.

Fournier also contends the Commission erred because he did not receive preferential treatment, and therefore did not receive unwarranted privileges. Paper 9 at pages 4-5. Again I must disagree.. The Commission reasonably concluded advantageous access to decisionmakers may constitute an unwarranted privilege. The Record contains substantial evidence that Fournier secured advantageous access to a DCF executive and to the Child Advocate, at least partially as a result of his position as an OSA consultant. The testimony of FitzGerald quoted in Fournier's Reply (Paper 9 at page 4), and the fact that the OCA office may be "secure" and "electronically locked," id., is not persuasive in light of the other evidence before the Commission in support of this portion of the Decision.

Evidentiary Ruling

Fournier argues the Commission improperly excluded evidence of a "Guidance" from a Commission "Attorney of the Day" provided to Sanja Shah, Fournier's Riscovery co-founder who was also an OSA consultant. Paper 7 at pages 1, 8-10; Paper 9 at page 5. The document

Fournier sought to admit at the Commission hearing was not the SEC record document, but Fournier's own reconstruction of SEC's purported advice to Shah. Id.; AR 1055-1056.

Fournier maintains the Guidance would support his position that he was not a state employee for these purposes. However, even assuming properly authenticated evidence could have been admissible at the hearing, the Commission was not required to consider it. As a matter of law, prior advice by a Commission attorney is binding on the Commonwealth only in a subsequent proceeding against the person (here, Shah) who requested the guidance to begin with. G.L. c. 268B, section 3(g). The Commission in exercising its expertise was free to consider application of its own statute to the facts before it without any other hearsay interpretation. The purported Guidance was not, as Fournier contends, required for the Commission's "verdict" (Paper 9 at page 5), and its exclusion was not unduly prejudicial. The Commission did consider advice Fournier himself allegedly received directly from an OSA attorney in concluding Fournier should not be assessed a penalty. AR 1199.

Conclusion

For all of the reasons stated, Plaintiff Jeffrey Fournier's Motion for Judgment on the Pleadings (Paper 7) is **DENIED**, the Cross-Motion for Judgment on the Pleadings brought by the State Ethics Commission (Paper 8) is **ALLOWED**, and the case is **DISMISSED**.

SO ORDERED.

Dated: September 19, 2022

Christine M. Roach