

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:
Michelle Tharp Penaloza

Pre-Complaint Conciliation Agreement

The West Virginia Ethics Commission and Michelle Tharp Penaloza freely and voluntarily enter into the following Conciliation Agreement pursuant to W. Va. Code § 6B-2-4(t) to resolve all potential charges arising from allegations of violations of the West Virginia Governmental Ethics Act ("Ethics Act") set forth below.

FINDINGS OF FACT

1. Michelle Tharp Penaloza ("Tharp Penaloza") is an employee of the West Virginia Department of Economic Development. ("Department of Economic Development").

2. At all times pertinent herein, Tharp Penaloza was a "public employee" as defined in the Ethics Act, at W. Va. Code § 6B-1-3(j).

3. The Ethics Commission has jurisdiction over alleged violations of the Ethics Act committed by public employees, such as Tharp Penaloza. W. Va. Code §§ 6B-1-1 through 6B-3-11.

4. Tharp Penaloza began her employment with the West Virginia Development Office in 2018 to assist with a federal grant given to the state of West Virginia to help it recover from the 2016 flood. Her job title is Community Development Block Grant Disaster Recovery Program Manager/Resiliency Unit Manager. [The W.


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Va. Development Office became the Department of Economic Development in 2021 per a legislative enactment.]

5. SBP (also known as the St. Bernard Project) is a nonprofit entity that assists government agencies and other entities prepare for and recover from natural disasters. SBP hosts Disaster Recovery Leader Practitioner Courses to further its mission to shrink the time between disaster and recovery.

6. In January 2020, West Virginia Development Office employees, including Tharp Penaloza, attended a SBP leadership course in New Orleans, LA. SBP provided the training and covered lodging and travel expenses for Tharp Penaloza and the other employees through a Walmart Foundation grant. The West Virginia Development Office reimbursed Tharp Penaloza and its other employees for meal expenses. It was permissible under the Ethics Act for Tharp Penaloza and the other employees to attend the training and to have SBP pay for their expenses because their attendance at the conference enhanced their job skills thereby providing a benefit to the state of West Virginia.

7. In February and March of 2020, the West Virginia Development Office, through Tharp Penaloza and her supervisor, Jennifer Ferrell, Director of Community Advancement and Development, requested that SBP assess West Virginia's Community Development Block Grant - Disaster Recovery program. SBP provided a free assessment to West Virginia using Walmart Foundation grant funds.

8. In August 2020, the Department of Economic Development, with signature approval from the West Virginia Office of Technology, submitted a request for proposals


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for a disaster case computer management system. The United States Department of Housing and Urban Development (HUD) required that the state of West Virginia procure this technology system due to adverse findings made by HUD in an audit of West Virginia's administration of federal grant funds given to aid the state in recovering from severe flooding in 2016.

9. Tharp Penaloza assisted in drafting the bid specifications for the disaster case management system. The West Virginia Purchasing Division awarded the contract to SBP, the lowest bidder, in October 2020. Tharp Penaloza then had continuing responsibilities relating to the technology contract between SBP and the Department of Economic Development because she is the state of West Virginia's Resiliency Unit Manager and was one of the persons responsible for reviewing SBP invoices. The Department of Economic Development has five levels of review for all invoices to be paid for with Community Development Block Grant - Disaster Recovery funds, and the SBP invoices went through this review process before the Economic Development Office submitted them to the state of West Virginia Auditor's Office for payment.

10. Tharp Penaloza was an instructor at SBP's three-day leadership course in New Orleans in November 2021. SBP paid her a \$1,500 stipend for teaching the course which was held during her regular work hours. Tharp Penaloza's supervisor, Jennifer Ferrell, authorized her to attend the course and to accept the stipend. It is Tharp Penaloza's understanding that Human Resources Director Tom McClure also authorized her to accept the stipend. Ferrell advised Tharp Penaloza that she did not have to take annual leave, and Tharp Penaloza did not. It is Tharp Penaloza's


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understanding that McClure also approved of her not taking leave. The state of West Virginia and SBP paid her travel expenses. Hence, the monetary value to Tharp Penaloza for teaching the course was \$1,500, and because she did not take annual leave to teach the course, her receipt of the money from SBP constituted double dipping.

11. Tharp Penaloza states that she accepted the \$1,500 stipend based upon erroneous guidance she received from her supervisors. Tharp Penaloza states that she is reimbursing SBP \$1,500 to correct the error and will provide the Ethics Commission with a receipt from SBP evidencing its receipt of payment.

12. SBP also asked Tharp Penaloza to be an instructor at its January 2022 and February 2022 leadership courses in New Orleans. For each three-day course, SBP paid her a stipend of \$1,500 and covered the travel costs detailed below.

13. For the January 2022 leadership course, SBP paid Tharp Penaloza's lodging and travel costs. Tharp Penaloza incurred \$225 in out-of-pocket travel expenses for her meals. This meal expense calculation is based upon the 2022 state of West Virginia and federal government per diem meal expense reimbursement rates in the following amounts for the period of January 10, 2022, to January 13, 2022.

- January 10, 2022: Meals travel day \$55.50
- January 11, 2022: Meals non-travel day \$40.00
- January 12, 2022: Meals non-travel day \$74.00
- January 13, 2022: Meals non-travel day \$55.50

Tharp Penaloza asserts that she also incurred other costs for teaching the course such as:


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- \$480 - Tharp Penaloza's payment to a non family member for child care services for her four children while she was on the trip
- \$1,338.24 - Tharp Penaloza further states that she took 32 hours of annual leave. Tharp is a salaried employee with an hourly pay rate of \$41.82. The value of the annual leave used by Tharp was \$1,338.24.

14. Since Tharp Penaloza took annual leave to teach the course, she was not double dipping. Tharp Penaloza asserts that she had a negative net gain for teaching the January 2022 leadership course because her costs, \$2,043.24, exceeded the \$1,500 stipend from SPB. The Ethics Act, however, restricts outside employment with vendors, and Tharp Penaloza now recognizes that she is subject to those restrictions.

15. For the February 2022 leadership course, SBP paid for Tharp Penaloza's lodging and travel. Tharp Penaloza incurred \$299 in out-of-pocket travel expenses for her meals. This meal expense calculation is based upon the 2022 state of West Virginia and federal government per diem meal expense reimbursement rates for the period of January 31, 2022, to February 4, 2022:

- January 31, 2022: Meals travel day \$55.50
- February 1, 2022: Meals non-travel day \$40.00
- February 2, 2022: Meals non-travel day \$74.00
- February 3, 2022: Meals non-travel day \$74.00
- February 4, 2022: Meals travel day \$55.50

Tharp Penaloza asserts that she also incurred other costs for teaching the course such as:

- \$600 - Tharp Penaloza's payment to a non family member for child care services for her four children while she was on the trip.


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- \$1,672.80 - Tharp Penaloza further states that she took 40 hours of annual leave. Tharp Penaloza is a salaried employee with an hourly pay rate of \$41.82. The value of the annual leave used by Tharp Penaloza was \$1672.80

16. Since Tharp Penaloza took annual leave to teach the course, she was not double dipping. Further, Tharp Penaloza asserts that she had a negative net gain Tharp Penaloza for teaching the February 2022 leadership course because her costs, \$2,571.80, exceeded the \$1,500 payment from SBP. The Ethics Act, however, restricts outside employment with vendors, and Tharp Penaloza now recognizes that she is subject to those restrictions.

17. Tharp Penaloza states that SBP has provided free benefits to the state of West Virginia, including paying the training expenses for approximately 12 state employees, conducting a free audit of the West Virginia CDBG - Disaster Recovery Housing Restoration Program, and coordinating a statewide flood symposium. She further states that she enhanced her job skills by being an instructor at SBP seminars and attending other classes at those seminars.

Relevant Legal Provisions

W. Va. Code § 6B-2-5(h) states, in relevant part:

(h) *Employment by regulated persons and vendors.* -- (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

- (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding 12 months; or
- (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.


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(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:

- (i) Drafting bid specifications or requests for proposals;
- (ii) Recommending selection of the vendor;
- (iii) Conducting inspections or investigations;
- (iv) Approving the method or manner of payment to the vendor;
- (v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or
- (vi) Taking other nonministerial action which may affect the financial interests of the vendor.

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor; "seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment; and "subordinate" includes only those agency personnel over whom the public official or public employee has supervisory responsibility.

(3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.

(A) The Ethics Commission shall, by legislative rule, establish general guidelines or standards for granting an exemption, but shall decide each application on a case-by-case basis;

(B) A person adversely affected by the restriction on the purchase of personal property may make such purchase after seeking and obtaining approval from the commission or in good faith reliance upon an official guideline promulgated by the commission, written advisory opinions issued by the commission, or a legislative rule.

(C) The commission may establish exceptions to the personal property purchase restrictions through the adoption of guidelines, advisory opinions or legislative rule.

(4) A full-time public official or full-time public employee may not take personal regulatory action on a matter affecting a person by whom he or she is employed or with whom he or she is seeking employment or has an agreement concerning future employment.

(5) A full-time public official or full-time public employee may not personally participate in a decision, approval, disapproval, recommendation, rendering advice, investigation, inspection, or other

substantial exercise of nonministerial administrative discretion involving a vendor with whom he or she is seeking employment or has an agreement concerning future employment.

(6) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

W. Va. Code § 6B-2-5(m) states:

(m) *Certain expenses prohibited.* – No public official or public employee shall knowingly request or accept from any governmental entity compensation or reimbursement for any expenses actually paid by a lobbyist and required by the provisions of this chapter to be reported, or actually paid by any other person.

In Advisory Opinion 2022-10, the Ethics Commission held that based on the plain language at W. Va. Code § 6B-2-5(h)(1), a public official may not receive and keep compensation from an association, which was also an agency vendor, in excess of his travel-related expenses for being an instructor or an attendee at a conference.

CONCILIATION OF VIOLATIONS

I, Michelle Tharp Penaloza, acknowledge that the West Virginia Governmental Ethics Act, at W. Va. Code § 6B-2-5(h)(1), prohibits me from being employed by or working as an independent contractor of, an agency vendor over whom I exercise control. I further acknowledge that W. Va. Code § 6B-2-5(m) prohibits me from receiving compensation for other employment or work during my regular state of West Virginia work hours unless I take annual leave or compensatory time and that this law is commonly referred to as the “double dipping” restriction.

I do not dispute that the SBP paid me \$1,500 for being an instructor at its November 2021 leadership conference in New Orleans and that I did not take annual


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leave. Further, the SBP and the state of West Virginia paid for my travel expenses. Hence, the net financial compensation to me from the SBP for the November 2021 training was \$1,500.

I believed that it was permissible to accept the payment from SBP for the November 2021 course because my supervisor authorized me to teach the course, be paid by SBP, and not take annual leave. It was also my understanding that the Human Resources Director authorized the same. Nevertheless, I now recognize that the Ethics Act prohibits me from being compensated by SBP for teaching the November 2021 course because I did not take annual leave and the SBP was (and is) a state vendor over whom I exercise control. I would like to state, however, that when I was a SBP instructor, I also used it as an opportunity to act as an advocate for West Virginia through my interactions with SBP staff and my peers and to improve my job skills by serving as an instructor and attending other training sessions. Recognizing that I erred in accepting the \$1,500 payment, I have sent payment to SBP in the amount of \$1,500 and will provide a receipt to the West Virginia Ethics Commission from the SBP evidencing the repayment.

I do not dispute that SPB also paid me \$1,500 for being an instructor at the January 2022 course and \$1,500 for being an instructor at the February 2022 course. I did not double dip, however, because I took annual leave. Moreover, I assert that I did not financially benefit from the payment of the stipends from SBP to me because my costs, which included meal expenses, child care, and the value of the annual leave I took, exceeded the compensation paid to me by SBP for being an instructor.


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I believed that it was permissible to accept the payments from SBP for the January and February 2022 courses because my supervisor authorized me to teach the course with the understanding that I would be paid by SBP and I took annual leave. I now recognize that the Ethics Act prohibits me from being compensated by SBP to teach the courses because the SBP was (and is) a state vendor over whom I exercised control for purposes of the employment restrictions. I assert, however, that I never used my state employment to improperly benefit SPB. While I helped draft the request for proposals for a contract awarded to SBP, it was the lowest bidder and the responsibility for awarding the contract rested with others. While I review SBP invoices, the invoices are subject to approximately four other levels of review by others in my agency before being submitted to the State Auditor's Office for payment.

In order to resolve this matter, I am entering into this Agreement. I understand that for this Conciliation Agreement to be finalized, the Ethics Commission must approve it and determine which sanctions to impose.

In consideration for the settlement of this matter, I agree to the Commission's imposition of the following sanctions:

1. To pay a fine in the amount of \$200 to be paid to the Ethics Commission within 30 days of the entrance of the Order approving this Agreement.
2. To provide the Ethics Commission written confirmation from SBP that I reimbursed SBP \$1,500 for the payment I received from SBP for being an instructor at the SBP November 2021 leadership conference in New Orleans within 30 days of the entrance of the Order approving this Agreement.
3. Training on the West Virginia Governmental Ethics Act, either in person or by viewing the training provided on the Ethics


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Commission's website, at ethics.wv.gov, within 30 days of the entrance of the Order approving this Conciliation Agreement. I shall provide written confirmation of the completion of this training to the Ethics Commission.

I understand and agree that if the Ethics Commission fails to approve this Conciliation Agreement, then this Conciliation Agreement is null and void and the Complaint against me will proceed before the Probable Cause Review Board, where it will be processed in accordance with the West Virginia Code and the Ethics Commission's Legislative Rules.

If the Ethics Commission approves the Agreement, it will enter an Order in which it approves the Agreement and sets forth the sanctions listed above.

Both parties understand that, pursuant to W. Va. Code § 6B-2-4(t), this Conciliation Agreement and Commission Order must be made available to the public.

3/2/23
Date

Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

February 16, 2023
Date

Michelle Tharp Penaloza
Michelle Tharp Penaloza
Resiliency Unit Manager
Community Advancement and Development
West Virginia Department of Economic Development

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BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:
Michelle Tharpe Penaloza

COMMISSION'S ORDER

After considering the Findings of Fact, Relevant Legal Provisions, and Conciliation of Violations in the Pre-Complaint Conciliation Agreement, the West Virginia Ethics Commission finds that the Pre-Complaint Conciliation Agreement is in the best interests of the State and Michelle Tharpe Penaloza, as required by W. Va. Code § 6B-2-4(t). In accordance with W. Va. Code § 6B-2-4(s), the Commission imposes the following sanctions:

1. Respondent shall pay a fine in the amount of \$200 to the Ethics Commission within 30 days of the entrance of this Order.
2. Respondent shall provide the Ethics Commission written confirmation from SBP that she reimbursed SBP \$1,500 for the payment she received from SBP for being an instructor at the SBP November 2021 leadership conference in New Orleans within 30 days of the entrance of this Order.
3. Respondent shall undergo training on the West Virginia Governmental Ethics Act, either in person or by viewing the training provided on the Ethics Commission's website, at ethics.wv.gov, within 30 days of the entrance of this Order and shall provide written confirmation of the completion of this training to the Ethics Commission within five business days of completing the training.

3/7/23
Date


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission