

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

MICHELLE MALONE,

Complaint No. VCRB 2017-05

**Manager,
River Road Public Service District,**

Respondent.

STATEMENT OF CHARGES AND NOTICE OF HEARING

The Probable Cause Review Board of the West Virginia Ethics Commission entered an Order on March 29, 2018, finding that there is probable cause to believe that Michelle Malone, the Respondent in the above-referenced Complaint, violated the following provisions in the Ethics Act and the Ethics Commission's Legislative Rules:

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

Use of office for private gain – (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

W. Va. Code § 6B-2-5(b)(4), effective July 7, 2017, which states, in relevant part:

A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides: *Provided*, That as used in this subdivision, "employment or working conditions" shall only apply to government employment: *Provided, however*, That government employment includes only those governmental entities specified in subsection (a) of this section.

W. Va. Code R. § 158-6-3 (1992), which states, in relevant part:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted by a public official or public employee to relatives or cohabitating sexual partners in employment matters without giving public notice and consideration to other applicants or qualifications required to perform the job.

3.2. "Relatives" are defined as individuals who are related to the public official or public employee as father, mother, son, daughter, brother, sister, or spouse.

3.3. A public official or public employee may avoid the appearance of nepotism by following these steps in hiring a relative or cohabitating sexual partner for a public position:

a. The public should be given reasonable advance notice of the availability of the job.

1. The notice should include a description of the job responsibilities, the qualifications required, the pay and the manner in which application for the job can be made.

2. The method of giving notice will of course vary from job to job but there must be reasonable public awareness of the availability of the job. Newspaper want ads and notices on the bulletin boards in public areas of the building are the most obvious and effective methods.

3. The notice must be made soon enough to give those members of the public who are interested in the job an opportunity to make application.

b. An objective, independent third party should be involved in the selection where a cohabitating sexual partner or family member is among those who have made application for the job.

1. To the extent possible, the public official or public employee should stay out of the selection process altogether. If he or she is one of several people with the authority to hire, others with authority should make the selection. If appropriate, the matter should be handled by his or her supervisor, or in the case of an elected official by a qualified person in another office.

2. A public official or public employee should at least have some independent person take part in the selection. He or she should avoid using a subordinate for the independent person.

3. If a public official or public employee must share in the decision, he or she should exercise his or her best objective judgment in making the selection, and be prepared to justify his or her selection.

....

3.5. A public official should not use his or her position for the private gain of a relative or cohabitating sexual partner by improperly giving bonuses, raises or other employment benefits to such person.

....

W. Va. Code R. § 158-6-3 (2017), which states, in relevant part:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to relatives or persons with whom the public official or public employee resides.

3.2. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public.

3.3. "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law.

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.

3.5.b. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition includes reviewing, auditing or evaluating work or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

3.5.c. Notwithstanding the limitations in this subsection, if a public official or public employee must participate in decisions affecting the employment, working conditions or supervision of the public official or public

employee's relative or a person with whom the public official or public employee resides, then:

3.5.c.1. An independent third party shall be involved in the process. A public official or public employee may not use a subordinate for the independent third party unless it is an elected public official who may not lawfully delegate the powers of his or her office, *e.g.*, county assessor or county clerk; and,

3.5.c.2. The public official or employee shall exercise his or her best objective judgment in making the decision, and be prepared to justify his or her decision.

3.6. A public official may not vote on matters affecting the employment or working conditions of a relative unless the relative is a member of a class of persons affected. A class shall consist of not fewer than five similarly situated persons. For a public official's recusal to be effective, he or she must excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests and recusing him or herself from voting on the issue.

The Probable Cause Order found that Respondent influenced or attempted to influence her daughter's and her spouse's working conditions, benefits and compensation; participated in decisions affecting their employment, working conditions, benefits and compensation, and supervised them in violation of W. Va. Code §§ 6B-2-5(b)(1) and 6B-2-5(b)(4), W. Va. Code R. § 158-6-3 (1992) and W. Va. Code R. § 158-6-3 (2017).

The Order directed that this Statement of Charges be prepared and that the matter be scheduled for a public hearing to determine the truth or falsity of the charges.

STATEMENT OF CHARGES

Jurisdiction

1. Respondent, Michelle Malone, ("Respondent") is the Manager of the River Road Public Service District and has served in that position since August 2003 and at all times

relevant herein.

2. Respondent was therefore a “public employee” as defined in the West Virginia Governmental 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 Respondent. W. Va. Code §§ 6B-1-1 through 6B-3-11.

Facts

4. The Respondent Michelle Malone is an employee of the River Road Public Service District (“PSD”). The PSD Board is comprised of three members who are appointed by the Monongalia County Commission.

5. The River Road PSD employs Michelle Malone as its manager. Her job responsibilities include but are not limited to overseeing the day-to day operations of the PSD, bookkeeping and supervising employees.

6. The Respondent’s involvement in PSD personnel decisions includes but is not limited to: determining when there is a need for additional staff; notifying the PSD board when additional staffing is needed; suggesting individuals who would be qualified, willing and able to perform the needed services, and presenting recommended changes to the terms of employment to help retain staff. She further reviews the time sheets of employees and prepares payroll checks for the Board members to sign.

7. The River Road PSD employs the following relatives of Michelle Malone: Charles Malone (her spouse) and Kady Malone (her daughter). The Respondent’s father-in-law, William Malone, performs work for the PSD as an independent contractor and, at times, assists Charles Malone with PSD work.

8. Based upon information and belief, the Respondent enters the number of hours worked by each employee, including her relatives', into the payroll system based upon the timesheets submitted by her family members to her. She then presents the checks to the PSD Board members for their signatures. Respondent Malone does not provide the corresponding time sheets for the relatives/employees to the PSD Board members.

9. Michelle Malone is also employed by the Paw Paw Public Service District ("PSD") Board as its manager. Kady Malone is employed by the Paw Paw PSD as well.

10. Neither the River Road PSD nor the Paw Paw PSD owns or leases office space. It is an implied term of the contracts of employment of Respondent Malone and Charles Malone that, other than field work, all PSD work is to be performed from their home.

11. Both PSDs currently operate from the Malones' primary residence and from a building they own on another piece of property which is located near their primary residence. The building on the other property is an old church building which they purchased and renovated. The old church building also has an apartment in it.

12. Until approximately December 2017, Kady Malone lived rent free in the apartment in the old church building ("old church") and was financially dependent upon her parents.

Count 1 – Kady Malone

13. The allegations set forth in paragraphs 1 through 12 are re-alleged and incorporated herein by reference.

14. Kady Malone is the daughter of Michelle Malone. She is employed by the River Road PSD and her job title is Office Assistant.

15. She currently works 20 hours per week for the River Road PSD. Since February 2014, her rate of pay has been \$12 per hour.

16. The River Road PSD first hired Kady as an independent contractor on or about September 12, 2012. The minutes reflect that Respondent Malone “asked the Board to consider paying someone to help with the office.” The River Road PSD then voted to authorize Respondent Malone to “pay someone” to work five hours a month at the rate of \$10 per hour. (Kady Malone’s name is not included in the motion or the meeting minutes.) Kady Malone worked as a contractor for the River Road PSD from September 2012 until July 2013.

17. On July 10, 2013, the River Road PSD voted to make Kady Malone a part-time employee. The PSD authorized her to work an additional 20 hours per month in addition to the 5 hours per month which she was already working. Her work hours therefore increased from 5 to 25 hours per month. Based upon information and belief, Michelle Malone participated in and/or influenced the decision of the PSD to increase her working hours and to change her employment status because of her job duties, which include monitoring the work of employees and advising the PSD of its staffing needs. Michelle Malone was present during the PSD meeting when it discussed and voted upon this matter.

18. In February 2014, the River Road PSD voted to raise Kady’s rate of pay from \$10 to \$12 per hour. Based upon information and belief, Michelle Malone was present during the meeting for the PSD’s discussion and vote on the motion.

19. The December 10, 2014, River Road PSD minutes reflect that Sandy Malone, the sister-in-law of Respondent Malone, had resigned from her position with the PSD. At that same meeting, the River Road PSD voted to authorized Kady Malone to work 15

hours per week, in addition to the hours she was already working. Kady Malone's work hours therefore were increased from 25 hours per month to approximately 80 hours a month. Based upon information and belief, Michelle Malone participated in and/or influenced this decision of the PSD because of her job duties which include monitoring the work of employees and advising the PSD of its staffing needs. Michelle Malone was present during the PSD meeting when it discussed and voted upon this matter.

20. On December 14, 2016, River Road voted to give Kady Malone vacation and retirement benefits. Based upon information and belief, Michelle Malone was present during the meeting for the PSD's discussion and vote on the motion.

21. Kady Malone is also a part-time employee of the Paw Paw Public Service District. Her job title is office assistant. She began her employment in 2012 with Paw Paw for five hours a month at the rate of \$10 per hour. In her position at Paw Paw, Kady Malone also works under the supervision of Respondent Malone. In July 2016, Paw Paw voted to increase Kady's hours to 20 hours per week and her salary to \$12 per hour. In December 2016, Paw Paw voted to give her vacation and retirement benefits. Based upon information and belief, Michelle Malone was involved in the decisions of Paw Paw relating to the employment and compensation of Kady Malone because of her job duties which include monitoring the work of employees and advising the PSD of its staffing needs.

22. Kady Malone performs work for both PSDs during her workday and from the same office in the old church building. Respondent Malone oversees Kady's work for the River Road PSD and Paw Paw PSD. Based upon information and belief, Respondent Malone facilitated the arrangement whereby Kady Malone performs work for both PSDs. Based upon information and belief, Michelle Malone does not require Kady Malone to

keep time sheets which reflect the number of hours devoted to each separate employment position. In 2015, River Road paid Kady Malone \$11,820 and Paw Paw paid her \$5,780. In 2016, River Road paid her \$12,480 and Paw Paw paid her \$9,840.

23. Based upon information and belief, at all times relevant herein, Kady Malone was financially dependent, in whole or in part, upon her parents. Kady Malone is no longer residing rent free in an apartment owned by her parents.

24. Respondent knowingly and intentionally used her public office for private gain by influencing or attempting to influence her daughter's working conditions, benefits and compensation; participating in decisions affecting her daughter's employment, working conditions, benefits and compensation, and supervising her in violation of W. Va. Code §§ 6B-2-5(b) and 6B-2-5(b)(4) and W. Va. Code R. § 158-6-3.

Count 2 – Charles Malone

25. The allegations set forth in paragraphs 1 through 12 are re-alleged and incorporated herein by reference.

26. Charles Malone is the Respondent's spouse.

27. Charles Malone became a part-time employee of the River Road PSD effective January 1, 2012. Prior to that date, and beginning in approximately 2004, he was an independent contractor for the River Road PSD.

28. His job title is System Manager.

29. His job duties include maintaining the PSD's water system, including repairing water lines. He also reads water meters.

30. The minimum yearly salary paid by River Road PSD to Charles Malone is \$24,000. This salary is based upon a base salary of \$12,000 per year plus 40 hours a month at the rate of \$25 per hour. There is no written employment contract.

31. Charles Malone does not have a set number of hours per week that he is required to work. According to Respondent Malone: "Depending upon the demands of the system, he may have only a few hours one week or he may have well over 20 or 30 hours worked in a week's time. His annual salary is based on him working a minimum of 40 hours per month." In 2015, River Road paid him \$26,031.33. In 2016, the River Road PSD paid him \$27,893.83. Based upon information and belief, in 2017 River Road paid him a similar amount.

32. Charles Malone records his time worked on timesheets, according to Respondent Malone. Based upon information and belief, Respondent Malone is responsible for reviewing his time sheets for accuracy. Respondent Malone sometimes initials his timesheets. At other times, no person initials them. Respondent Malone prepares his payroll check and submits it to the PSD Board. The Board members are not given the corresponding time sheets.

33. Charles Malone is also employed on a full-time basis by the City of Morgantown. According to Respondent Malone, he performs his work for River Road in the evenings and on weekends. The PSD Board is not involved in determining when he performs his work or verifying the number of hours he works for the River Road PSD. Either Michelle Malone or Charles Malone, or both, participate in decisions regarding when William Malone, the father of Charles Malone, is needed to assist Charles Malone. William Malone is also a contractor for the River Road PSD.

34. Respondent knowingly and intentionally used her public office for private gain by influencing or attempting to influence her spouse's working conditions, benefits and compensation; participating in decisions affecting her spouse's employment, working conditions, benefits and compensation, and supervising him in violation of W. Va. Code

§§ 6B-2-5(b) and 6B-2-5(b)(4) and W. Va. Code R. § 158-6-3.

NOTICE OF HEARING

Notice is hereby given that a PUBLIC HEARING will be held on June 25, 2018, at the offices of the West Virginia Ethics Commission, 210 Brooks Street, Third Floor Conference Room, Charleston, West Virginia, beginning at 10:00 a.m. to determine the truth or falsity of the charges herein. The hearing will be continued until completed.

In accordance with W. Va. Code § 6B-2-4 and 158 CSR § 17-4.1, H. F. Salsbery, will serve as the independent hearing examiner to preside at the hearing. The record compiled by the hearing examiner will be submitted to the members of the Ethics Commission, who will make a final decision in this case.

Dated: March 29, 2018

Rebecca Stepto / KW
Rebecca L. Stepto
Executive Director

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

**WEST VIRGINIA ETHICS COMMISSION,
Complainant,**

v.

VCRB 2017-05

MICHELLE MALONE,

**Manager,
River Road Public Service District,
Respondent.**

CERTIFICATE OF SERVICE

I, Rebecca L. Stepto, Executive Director of the West Virginia Ethics Commission, hereby certify that I mailed a true and complete copy of the foregoing **STATEMENT OF CHARGES AND NOTICE OF HEARING** on March 29, 2018, to:

Via U.S. Mail and Certified Mail, Return Receipt Requested:

Michelle Malone
150 Wiseman Road
Morgantown, WV 26501

Respondent

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