

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:
Michelle Malone,
Manager,
River Road Public Service District

COMPLAINT NO. VCRB 2017-005

Conciliation Agreement

The West Virginia Ethics Commission and Michelle Malone 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 in the above-referenced Complaint.

Findings of Fact

1. Respondent, Michelle Malone (“Respondent”), served as the Manager of the River Road Public Service District and the Paw Paw Route 19 Public Service District at all times relevant herein.
2. As an employee of a public service district, the Respondent is 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 West Virginia public employees such as the Respondent. W. Va. Code §§ 6B-1-1 through 6B-3-11.
4. The Monongalia County Commission appoints the members of the River Road Public Service District (“River Road PSD” or “PSD”) Board. The Marion County

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Commission appoints the members of the Paw Paw Route 19 Public Service District ("Paw Paw PSD" or "PSD") Board.

5. The current members of the River Road PSD Board are Peter Christoff, Danny Wolfe and Jim Smith.

6. The current members of the Paw Paw Route 19 PSD Board are Robert Arnett, Robert Frame and Donald Tennant.

7. The River Road PSD employs Charles Malone, the Respondent's spouse, and Kady Malone, the Respondent's daughter. The Respondent's father-in-law, William Malone, performs contract work for the PSD but is not a PSD employee. The initial decision to employ Charles Malone and Kady Malone is not a matter before the Ethics Commission as the hiring decisions pre-date the two-year statute of limitations in effect at the time.

8. Although the initial decision to employ Charles Malone and Kady Malone is not a matter before the Ethics Commission, a general overview of the history of the family members' employment is necessary.

9. In August 2003, the River Road PSD hired Respondent and her husband Charles Malone as independent contractors to manage and operate the River Road PSD. The West Virginia Public Service Commission ("WVPSC") approved the employment of Respondent and Charles Malone as independent contractors in its Order for Case No. 04-0366-PWD-PC, dated August 9, 2004. The Order states that Respondent is to provide

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certain bookkeeping services and Charles Malone is to provide operation and maintenance services. At that time, the River Road PSD had no employees.

10. In 2010, based upon the advice of its accountants, the River Road PSD converted Respondent from an independent contractor to a payroll employee. For the same reason, it converted Charles Malone from an independent contractor to a payroll employee in 2012.

11. When the River Road PSD hired Respondent and Charles Malone as independent contractors, it was an implied term of their contracts of employment that, other than field work, all the PSD work was to be performed from their home. When they began work for the Paw Paw PSD, they also worked from their home. Since the Malones have worked for the PSDs, neither PSD has owned or leased office space.

12. At present, both PSDs continue to operate from the Malones' home and another piece of property which Respondent and Charles Malone own. The other property is an old church building ("old church") which they partially renovated and use which is located near their primary residence. The old church building is separated into two distinct spaces: an office and storage space used for both PSD businesses, and an apartment.

13. From September 2015 until November 2017, Kady Malone lived in the apartment area of the old church. Kady Malone did not pay rent for the apartment. Kady Malone's work for the PSDs was conducted in the office space in the old church.

14. The Malones do not charge the PSDs for the use of the office or storage

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space in the old church; however, the PSDs pay solely for the electric service (metered separately) for the portion of space in the old church being used for PSD business. The Respondent states that the PSDs share these costs equally through an informal cost-sharing agreement. The PSDs also separately pay for their own telephone service and equally split the cost of a fax line and internet service.

15. For privacy and security reasons, neither the Malones' home nor the office space in the old church is open to the public. Both the River Road and Paw Paw PSDs contract with local businesses in Monongalia County to accept walk-in payments from customers of the PSDs.

16. Respondent states that the PSDs are unable to rent or purchase office space due to financial constraints.

17. Respondent states that the employment of family members resulted solely from the unique factors of the PSDs, including their small sizes, that her employment grew out of a contractor relationship that pre-dated her official employment with either PSD, that neither PSD had available resources to rent office space and that each PSD board formally voted to hire her relatives with full knowledge of the familial relationships at the time they were hired and at all times relevant herein.

18. The River Road PSD, with the support of the Monongalia County Commission, in May 2018 asked the Morgantown Utility Board (MUB) to acquire the River Road PSD because the system has grown by about 300 customers in 15 years. The Respondent states the PSD is understaffed and is unable to find and retain adequate field

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personnel to maintain and operate the system. The MUB has agreed to pursue the acquisition of the River Road PSD beginning with the implementation of an Operation and Maintenance Agreement. Upon approval of the O&M Agreement by the Public Service Commission, the MUB will assume complete and immediate responsibility for the management and operation of the River Road PSD, and the existing River Road PSD staff (both employees and contractors) will end their employment with the PSD.

Charles Malone

19. Charles Malone is the Respondent's husband.

20. Charles Malone became a part-time employee of the River Road PSD effective January 1, 2012. Prior to that date, and beginning in approximately 2003, he was an independent contractor for the River Road PSD.

21. He is referred to as the River Road PSD's "Systems Manager" but has no formal title with River Road PSD.

22. He is responsible for the operation and maintenance of the PSD's water system, including minor maintenance and repair, line locates, leak detection, service orders and meter reading.

23. 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 for serving in an on-call position 24 hours a day, 365 days a year plus 40 hours a month at the rate of \$25

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per hour for field work. There are agreed upon terms of employment, but there is no written employment contract.

24. Charles Malone does not have a set number of hours per week that he is required to work. Respondent asserts, "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."

25. Charles Malone records all his time worked on a timesheet. Respondent reviews Charles Malone's timesheet calculations for accuracy and on a few occasions initialed that she reviewed them. The protocol is that a copy of the corresponding pay stub/statement which details the gross pay, the vacation leave used/remaining, and retirement benefits paid (per payroll and year-to-date) is given to all the board members present at the meeting to review prior to signing the checks in lieu of the corresponding time sheets. Two PSD board members are required to sign employee paychecks.

26. Charles Malone is also employed on a full-time basis by the City of Morgantown. According to Respondent, he performs his work for River Road PSD in the evenings and on weekends. If required to perform work for River Road PSD during his regular work hours for the City of Morgantown, he takes annual leave.

27. According to Respondent, Charles Malone's qualifications for the position include his past experience as a laborer for the Morgantown Utility Board. Further, he

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has a Class 1D Water Operator Certification and a Master Plumber License. Respondent states, “[h]e has over 12 years of experience working as a Contractor for the Paw Paw Rt. 19 PSD in which he read meters, performed minor maintenance and services, performed water sampling procedures, administered delinquent account procedures, etc. as a certified Class 1D Water Operator.”

28. Charles Malone previously performed work for the Paw Paw PSD but has not performed any paid work for the Paw Paw PSD since at least 2014.

Kady Malone

29. Kady Malone is the daughter of the Respondent. She is employed as the Office Assistant for both PSDs and is supervised by the Respondent.

30. She currently works 20 hours per week for each PSD. Her current hourly rate of pay at both PSDs is \$12 per hour.

31. Kady Malone performs most of her work for both PSDs in the office space in the old church. She also performs some field work. Respondent states that Kady is qualified for the position of Office Assistant based upon Kady’s knowledge of the workings of the PSDs as she has worked in some capacity for the River Road PSD since 2012. When she first began working for the PSDs, she was a student and an employee at West Virginia University (“WVU”). She has since graduated from WVU with a Bachelor of Science Degree in Agricultural Business Management and Rural Development.

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Respondent states that Kady Malone has continued her education by taking a variety of water utility-related courses over the past several years.

32. On September 12, 2012, the River Road PSD voted to retain a new contractor to assist with the office work, to replace the former contracted office assistant who had left the position two years earlier. The River Road PSD further voted that the work would comprise of five hours a month at a rate of \$10 per hour. A week earlier, on September 5, 2012, the Paw Paw PSD had approved the retention of an independent contractor for the same duties. Kady Malone was selected by both PSDs to serve in that position and both knew prior to their respective votes the relationship between Kady Malone and the Respondent. Respondent had no vote in either decision.

33. On July 10, 2013, the River Road PSD voted to hire Kady Malone as a part-time employee. The PSD authorized her to work 20 hours per month in the field in addition to the 5 hours per month which she was already working in the office. Her work hours therefore increased from 5 to 25 hours per month. In January 2014, the River Road PSD voted to raise Kady's rate of pay for office work to \$12 per hour to make it the same amount that she was being paid for field work.

34. 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. Sandy Malone was an independent contractor employed by the Birchfield Water Association to work in the field as a meter reader, a position she temporarily retained when the Association merged with River Road PSD in July 2013. At the December 10,

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2014, meeting, the River Road PSD voted to authorize Kady Malone to work 15 hours per week in the office in addition to the 20 hours she was already working in the field. Kady Malone's work hours therefore were increased from 25 hours per month to approximately 80 hours a month.

35. In July 2016, the Paw Paw PSD voted to increase Kady's hours to 20 hours per week and her salary to \$12 per hour although Respondent had no vote on any hiring or compensation matters involving Kady.

36. In December 2016, each PSD, at their respective board meetings, voted to give Kady Malone vacation leave and retirement benefits.

37. The River Road PSD and Paw Paw PSD do not have a formal Memorandum of Understanding or contractual agreement establishing how the hours of Kady Malone will be accounted for regarding her work for each PSD.

38. The Respondent was present at this meeting and all meetings where Kady's compensation and benefits were discussed although Respondent had no vote on any hiring or compensation matters involving Kady Malone.

Relevant Legal Provisions

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.

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W. Va. Code § 6B-2-5(b)(4) (2017) provides:

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) provides:

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.

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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) provides:

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.

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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.

Conciliation of Violations

I, Michelle Malone, Respondent, agree that the employment of my relatives by the River Road PSD and the Paw Paw PSD does not comply with the requirements in the Ethics Act and related Legislative Rule, W. Va. Code R. § 158-6-3, due to my involvement in their supervision and matters affecting the terms and conditions of their employment. In order to resolve this matter, I am entering into this Agreement. For this Conciliation

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Agreement to be finalized, I understand that the Ethics Commission must approve it and must determine which sanctions to impose.

In consideration for the settlement of this matter and any matters relating to the employment or working conditions of Kady Malone at the Paw Paw PSD as outlined in this Agreement, I agree to comply with the terms of the Cease and Desist Order which is incorporated into this Conciliation Agreement and attached hereto as "Appendix A."

I also agree, in consideration for the settlement of this matter and any matters relating to the employment or working conditions of Kady Malone at the Paw Paw PSD as outlined in this Agreement, to the Commission's imposition of the following sanctions:

1. A fine in the amount of \$1,000;
2. Reimbursement to the Ethics Commission in the amount of \$750 toward the costs of prosecuting this matter;
3. A public reprimand, and
4. Training on the West Virginia Governmental Ethics Act either in person or by viewing the training provided on the Ethics Commission's website, at www.ethics.wv.gov, before August 15, 2018. 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 Statement of Charges against me will proceed to a public hearing, where it will be processed in accordance with the West Virginia Code and the Ethics Commission's Legislative Rules.

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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.

7/12/18
Date

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

7/2/18
Date

Michelle Malone
Michelle Malone, Respondent

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:

COMPLAINT NO. VCRB 2017-005

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

CEASE AND DESIST ORDER

In accordance with the terms of the Conciliation Agreement Respondent Malone agrees to comply with the terms of this Order.

1. Effective August 15, 2018, the River Road Public Service District will be responsible for all salary requests, reimbursement requests and job title classifications for Kady Malone and Charles Malone. Should Respondent continue past this date in a contractor or employment relationship with the River Road Public Service District, she agrees to comply with the nepotism provisions of the Ethics Act and Legislative Rule at W. Va. Code § 6B-2-5(b) and W. Va. Code R. § 158-6-3 (2017) with regard to Kady Malone and Charles Malone.

2. If the Morgantown Utility Board ("MUB") acquires the River Road PSD and the Respondent continues to work for the MUB, and if the MUB employs any of Respondent's relatives, Respondent will comply with the nepotism provisions of the Ethics Act and Legislative Rule at W. Va. Code § 6B-2-5(b) and W. Va. Code R. § 158-6-3 (2017).

3. Effective August 15, 2018, the Paw Paw Route 19 Public Service District will be responsible for all salary requests, reimbursement requests and job title classifications for Kady Malone. Should Respondent continue past this date in a

contractor or employment relationship with the Paw Paw Route 19 Public Service District, she agrees to comply with the nepotism provisions of the Ethics Act and Legislative Rule at W. Va. Code § 6B-2-5(b) and W. Va. Code R. § 158-6-3 (2017) with regard to Kady Malone.

4. Effective August 15, 2018, Respondent will request that the River Road PSD and the Paw Paw Route 19 PSD place an agenda item on their respective agendas for their next monthly meetings for discussion and vote on entering into a Memorandum of Understanding outlining the duties of Kady Malone for each Public Service District.

5. Respondent shall provide written confirmation to the Ethics Commission by September 15, 2018, that she has complied with this Order, including providing an overview of the action taken by the PSDs regarding her supervision, if any, of her relatives to ensure compliance with nepotism rules. Respondent shall also provide to the Ethics Commission a copy of the written agreement between the River Road PSD and Paw Paw Route 19 PSD, if any, concerning Kady Malone's employment.

OTHER

Respondent acknowledges that compliance with this Order requires the cooperation of, and action by, the River Road PSD and the Paw Paw Route 19 PSD. Respondent understands that if she is unable to comply with the terms of this Order due to the failure, inability or unwillingness of either the River Road PSD or the Paw Paw Route 19 PSD to assign someone to assume the supervisory responsibilities for Kady Malone and Charles Malone and to take the other action outlined herein, then she will notify the West Virginia Ethics Commission by September 15, 2018, with the

understanding that the West Virginia Ethics Commission may reopen its complaint investigation, initiate a Complaint, or take other action authorized by the Ethics Act.

Respondent will provide a copy of this Cease and Desist Order and a copy of the Ethics Commission's Legislative Rule, W. Va. Code R. § 158-6-3 (2017), entitled "Use of Office for Private Gain, Including Nepotism," to all members of the River Road and Paw Paw Route 19 PSDs. Respondent understands that the Ethics Act sets a minimum standard of conduct and that either the River Road PSD or the Paw Paw Route 19 PSD may impose stricter rules, including restrictions on the hiring of relatives.

7/12/18
Date

7/2/18
Date

Robert J. Wolfe, Acting Chair
Robert J. Wolfe, Chairperson
W.Va. Ethics Commission

Michelle Malone
Michelle Malone, Respondent

for Robert Wolfe

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:

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

COMPLAINT NO. VCRB 2017-005

COMMISSION'S ORDER

After considering the Findings of Fact, Relevant Legal Provisions and Conciliation of Violations in the Conciliation Agreement, the West Virginia Ethics Commission finds that the Conciliation Agreement, including Appendix A (Cease and Desist Order), is in the best interest of the State and Michelle Malone 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. A fine in the amount of \$1,000 to be paid on or before September 1, 2018;
2. Reimbursement to the Ethics Commission in the amount of \$750 toward the costs of prosecuting this matter to be paid on or before September 1, 2018
3. A public reprimand, and
4. Training on the West Virginia Governmental Ethics Act either in person or by viewing the training provided on the Ethics Commission's website, at www.ethics.wv.gov, before August 15, 2018. Michelle Malone shall provide written confirmation of the completion of this training to the Ethics Commission.

Date

4/12/18


Betty S. Ireland, Acting Chairperson
West Virginia Ethics Commission