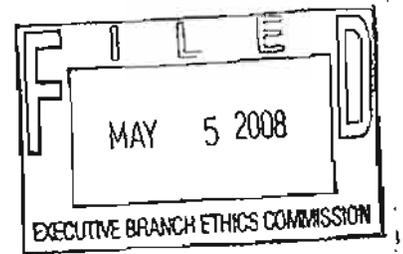


COMMONWEALTH OF KENTUCKY  
EXECUTIVE BRANCH ETHICS COMMISSION  
CASE NO. 07-103



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

MARC D. WILLIAMS

RESPONDENT

\* \* \* \* \*  
FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND RECOMMENDED ORDER  
\* \* \* \* \*

This matter came on for hearing on September 24, November 9, and November 15, 2007. Attorney John Steffen appeared on behalf of the Complainant, the Executive Branch Ethics Commission. Jill LeMaster, Executive Director of the Executive Branch Ethics Commission, was also present at the hearing. Attorney J. Guthrie True appeared on behalf of the Respondent, Marc D. Williams, who was also present at the hearing.

The issue in this case is whether the Respondent, Marc D. Williams, violated certain provisions of the Executive Branch Code of Ethics, specifically KRS 11A.020(1)(b) and 11A.020(1)(d). After considering the evidence presented in the case, the Hearing Officer recommends that the Executive Branch Ethics Commission find the Respondent, Marc D. Williams, not guilty of the Allegation of Violation issued against him in this case. The Hearing Officer's specific findings of fact, conclusions of law, and recommended order are detailed below.

## I. The Evidence on the Record of this Case

Pursuant to KRS 13B.090(1), "findings of fact shall be based exclusively on the evidence on the record."

The evidence on the record of this case consists of: (1) the testimony of the witnesses who testified at the hearing in this matter; and (2) the exhibits that were admitted into evidence at the hearing in this matter.

The Complainant, the Executive Branch Ethics Commission, called eight (8) witnesses to testify at the hearing in this matter:

1. John McCarthy, Managing Partner, McCarthy and Speaks, formerly Chairman of the Republican Party of Kentucky [Transcript of Hearing (Tr.), Vol. I, pp. 29 - 54];
2. Scott Crosbie, Attorney and Lobbyist [Tr., Vol. I, pp. 55 - 78];
3. David Disponett, former volunteer with the Fletcher Administration [Tr., Vol. I, pp. 80 - 148];
4. (William) David Jones, former Deputy State Highway Engineer, Transportation Cabinet [Tr., Vol. II, pp. 7 - 117]
5. Sam Beverage, former State Highway Engineer, Transportation Cabinet [Tr., Vol. II, p. 118 - Vol. III, p. 232];
6. (Gerald) Michael Bezold, Transportation Engineer, Planning Office, District 6, Transportation Cabinet [Tr., Vol. III, pp. 234 - 291];
7. Charles Hines, Deputy Inspector General, Office of Inspector General, Transportation Cabinet [Tr., Vol. III, pp. 292 - 312]; and
8. Brad Eldridge, Location Engineer, Transportation Cabinet [Tr., Vol. IV, pp.

7 - 84].

The Respondent, Marc D. Williams, called two (2) witnesses to testify at the hearing in this matter:

1. William S. May, President, DLZ Kentucky [Tr., Vol. IV, pp. 86 - 103]; and
2. Kevin Rust, former Branch Manager for Preconstruction, District 6,

Transportation Cabinet [Tr., Vol. IV, pp. 104 - 148].

Twelve (12) exhibits were admitted into evidence at the hearing in this matter:

1. Selection Process Policy [Exhibit 1];
2. Certification of Confidentiality form [Exhibit 2];
3. "Ex Parte" Disclosure form [Exhibit 3];
4. Bulletin for advertisement for professional consultant services in Harrison

County [Exhibit 4];

5. Initiating Order in the case of Samuel H. Beverage [Exhibit 5];
6. Settlement Agreement in the case of Samuel H. Beverage [Exhibit 6];
7. Perjury Indictment against Sam Beverage [Exhibit 7];
8. Bulletin for advertisement for professional consultant services in Boone,

Kenton, Campbell Counties [Exhibit 8];

9. "Ex Parte" Disclosure form signed by Brad Eldridge [Exhibit 9];
10. Certification of Confidentiality form signed by Brad Eldridge [Exhibit 10];
11. Committee Ranking to Determine the Three Short-Listed Consultant Firms,

Harrison County Project [Exhibit 11]; and

12. Selection Evaluation, Harrison County Project [Exhibit 12].

## II. Findings of Fact

1. The Complainant, the Executive Branch Ethics Commission, is the state agency that is authorized to investigate and to initiate administrative proceedings to determine whether there has been a violation of the Executive Branch Code of Ethics. KRS Chapter 11A.

2. The Respondent, Marc D. Williams, was the Commissioner of the Department of Highways in the Transportation Cabinet at all times relevant to this case.

3. On February 23, 2007, the Executive Branch Ethics Commission issued an Initiating Order, with Allegation of Violation, alleging that Commissioner Williams had violated certain provisions of the Executive Branch Code of Ethics. Specifically, the Commission alleged that Commissioner Williams violated KRS 11A.020(1)(b) and (d) by using or attempting to use his influence and/or his official position in directing a State Highway Engineer to use or attempt to use his influence and/or official position to influence Consultant Selection Committee members during an open selection process relating to Item No. 6-1052.00, a Transportation Cabinet project located in Harrison County, for the benefit of an outside consulting firm. [Initiating Order, with Allegation of Violation, 2-23-07]

4. The State Highway Engineer referenced in this allegation is Sam Beverage. The outside consulting firm referenced in this allegation is Brighton Engineering, which is also known as DLZ ("Brighton/DLZ"). The Commission's specific allegation is that Commissioner Williams directed Sam Beverage to influence members of a Consultant Selection Committee to select Brighton/DLZ for a Transportation Cabinet project located in Harrison County ("Harrison County Project").

5. The Hearing Officer's findings of fact regarding this allegation are divided into six categories: (a) the Transportation Cabinet's consultant selection process in general; (b) the role of the Selection Committee in the Cabinet's consultant selection process; (c) the Transportation Cabinet projects advertised in February 2005; (d) Brighton/DLZ; and (e) the attempts made to influence Selection Committee members for the Harrison County Project and the Northern Kentucky Project; and (f) the allegation made against Commissioner Williams. The Hearing Officer will address each of these categories in turn.

**A. Consultant Selection Process: General**

6. Whenever the Transportation Cabinet wishes to procure engineering or engineering-related services from a private consulting firm, the Cabinet is required to follow the procurement procedures specified in the Model Procurement Code (KRS Chapter 45A). [See KRS 45A.800 - KRS 45A.838] In addition to the statutory requirements, the Cabinet has issued administrative regulations (600 KAR Chapter 6),<sup>1</sup> as well as internal policies (Exhibit 1), regarding obtaining professional engineering and related services.

7. Pursuant to these statutory, regulatory, and policy requirements for the type of engineering or engineering-related services at issue in this case, the Cabinet is required to issue a request for proposal for the engineering services that the Cabinet wishes to procure.<sup>2</sup> [KRS 45A.825] The request for proposal is called a Procurement

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<sup>1</sup>Some of the regulations in 600 KAR Chapter 6 were amended effective 11-9-06. The provisions in the regulations cited in this Recommended Order, however, were not changed.

<sup>2</sup>There are certain situations in which the Model Procurement Code does not require the procedures described in this section. See, e.g., KRS 45A.810(2). Those situations, however, do not apply in this case and, accordingly, are not discussed in this section.

Bulletin, and is issued by the Cabinet's Division of Professional Services. [600 KAR 6:050(1); Exhibit 1, p. 2]

8. The Procurement Bulletin is required to include:
  - A discussion of procedures to follow for submission of a response to the project
  - Evaluation factors and their relative weights
  - A general scope of the project
  - An anticipated project schedule
  - Disadvantaged Business Enterprise (DBE) use
  - A list of firms prequalified in each applicable category as of the date of the bulletin
  - A timetable for the selection committee's meetings for the project
  - Other materials that may assist firms in responding to the announcement
  - Deadline for filing responses

[Exhibit 1, pp. 1 - 2; KRS 45A.825(2)]

9. The Procurement Bulletin is mailed to all prequalified consultants and consultants having pending prequalification applications. In addition, an announcement of the availability of the Procurement Bulletin is advertised in at least two newspapers of general, multi-county circulation and one newspaper that has minorities as its targeted readership. [Exhibit 1, p. 3] The Procurement Bulletin is also posted on the internet.

10. All responses to the Procurement Bulletin are to be sent to the Cabinet's Division of Professional Services. [Exhibit 1, p. 3]

11. No firm will be considered for a project that appears in a Procurement

Bulletin for Engineering and Related Services unless the firm is prequalified in the specified areas of prequalification prior to the response due date that appears in the Procurement Bulletin for the particular project. [KRS 45A.825(1); Exhibit 1, p. 3] A consulting firm has to meet certain requirements to be qualified to do work for the Transportation Cabinet. The Cabinet's Division of Professional Services reviews an engineering consulting firm's credentials to determine if the firm is qualified to do work for the Cabinet. A firm is a prequalified firm if the firm has obtained that status from the Division of Professional Services and has been designated as qualified to submit proposals for Transportation Cabinet projects. [Testimony of David Jones (Tr., Vol. II, pp. 44 - 45, 51)]

12. The Division of Professional Services prepares a certified list of all firms that responded on or before the deadline specified in the Procurement Bulletin and certifies the prequalification status of each firm. [Exhibit 1, pp. 3 - 4; KRS 45A.825(5)]

13. The list of responses to the Procurement Bulletin shall be confidential until the contract is negotiated and executed, and the selected firm receives a notice of approval for payment from the Division of Professional Services. [Exhibit 1, p. 4; 600 KAR 6:050, Section 2(3)(d)]

#### **B. Consultant Selection Process: Selection Committee**

14. A Professional Engineering and Related Services Selection Committee ("Selection Committee") is established for the purpose of reviewing and evaluating the responses submitted for a Procurement Bulletin. [KRS 45A.810(2); Exhibit 1, p. 4] The Selection Committee is established after the request to advertise for a consultant to perform professional engineering or related services has been approved. [KAR 6:060,

Section 1(7)]

15. The Selection Committee consists of six (6) members:
- Two (2) professional engineers randomly selected from the "Secretary's Pool," which is a pool of six (6) engineers who are employees of the Transportation Cabinet and who are appointed to the pool by the Cabinet Secretary;
  - Two (2) professional engineers who are merit employees in the Cabinet and who are appointed by the director of the User Division that will be responsible for monitoring the professional services;
  - One (1) individual randomly selected from the "Governor's Pool," which is a pool of three (3) individuals appointed to the pool by the Governor after the Governor receives nominations for nine (9) individuals from the Kentucky Society of Professional Engineers and the Kentucky Consulting Engineers Council; and
  - One (1) merit employee of the Auditor of Public Accounts, appointed by the Auditor, who may, at the discretion of the Auditor, serve as a nonvoting member of the committee.

[KRS 45A.810(5); Exhibit 1, pp. 4 - 5] [Testimony of David Jones (Tr., Vol. II, pp. 13, 17 - 18)]

16. Voting members of the Selection Committee receive and review copies of the proposals that were submitted in response to the Procurement Bulletin prior to the Selection Committee meeting. The voting members preliminarily evaluate and numerically rate each firm using the weighted evaluation factors that appeared in the Procurement Bulletin. [Testimony of David Jones (Tr., Vol. II, pp. 14 - 17, 69 - 70, 77 - 78, 85 - 86)]

17. The Selection Committee then meets in Executive Session to select the three (3) most qualified firms and to rank them in order of preference by considering the weighted evaluation facts that appeared in the Procurement Bulletin. [KRS 45A.825;

600 KAR 6:060, Section 2(4)]

18. The process begins by having each committee member list the three firms that he or she ranked highest. All of these firms are placed on the short list of firms. Each of the firms on this short list then is individually discussed by the Selection Committee in regard to the firm's qualifications, the quality of its proposal, and the evaluation factors. Each firm remaining in consideration after this discussion is then individually ranked by the Selection Committee members using secret ballots. A new listing of short listed firms is created based on the composite rankings of the secret ballots. The process continues until three firms remain for consideration, at which time the Selection Committee members individually rank the three firms using secret ballots. The results of that balloting determine the ranked order of the three best qualified firms. The Chairperson of the Selection Committee then notifies the Director of the Division of Professional Services of the firms determined by the Selection Committee to be the three best qualified and the order of their ranking. [600 KAR 6:060, Section 2(5) - (10), (14)]

19. It is not unusual for someone from the Professional Services Division to interrupt a Selection Committee meeting to inform the Selection Committee that one of the firms whose proposals are being reviewed has just been selected for another project by another Selection Committee. This is done so that the Selection Committee can take that fact into consideration in deciding whether the firm has the capacity to handle another project at the same time. In addition, this is done because the Transportation Cabinet's philosophy is to try to spread the work around and to equalize the selection of firms for projects. This type of information has been used by Selection

Committees in making their final determinations. [Testimony of David Jones (Tr., Vol. II, pp. 55 - 61); testimony of Brad Eldridge (Tr., Vol. IV, pp. 17 - 18, 47 - 48); testimony of Kevin Rust (Tr., Vol. IV, pp. 139 - 141)]

20. Each member of a Selection Committee is required to sign a document titled "Certification of Confidentiality," which states:

I understand that I am not to discuss any specifics of the above project with any prequalified firm from the time the project appears in the Procurement Bulletin for Engineering and Related Services until such time [as] the Legislative Research Commission's Government Contract Review Committee has approved the contract and the Division of Professional Services has issued a Notice of Approval for Payment to the selected Consultant, with the exception of a pre-submittal meeting in which all prequalified firms have a[n] opportunity to participate.

[Exhibit 2][Testimony of David Jones (Tr., Vol. II, pp. 48 - 49)]

21. Each member of a Selection Committee is also required to sign a document titled "'Ex Parte' Disclosure," which states:

[I] certify that I have had no contact concerning the above project with any firms that responded to the Procurement Bulletin for Engineering and Related Services for this project from the time of the distribution of the bulletin until the time of this selection committee meeting. The sole exception to this being the possible holding of a pre-submittal meeting or other authorized public meeting for this project held under the supervision of the Transportation Cabinet's Division of Professional Services or Final Selection interviews as permitted in KRS 45A.800 to KRS 45A.835.

[Exhibit 3][Testimony of David Jones (Tr., Vol. II, pp. 52 - 53)]<sup>3</sup>

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<sup>3</sup>Each member of a Selection Committee is also required to sign two other documents: (1) Certification of Understanding of Restrictions for Members of Professional Engineering Services Selection Committee; and (2) Certification of Conformity with Procurement Process. [600 KAR 6:060, Section 1(5)] These additional documents, however, were not placed into evidence in this matter.

22. Each member of a Selection Committee is also required to comply with the Executive Branch Code of Ethics established at KRS Chapter 11A. [600 KAR 6:060, Section (9)(a)]

**C. Transportation Cabinet Projects Advertised in February 2005**

23. There were two projects advertised in February 2005 by the Transportation Cabinet. One project was the Harrison County Project and the other project was a Northern Kentucky Project.

**C.1. Harrison County Project**

24. Item Number 6-1052.00 was a bridge replacement project in Harrison County and is the Harrison County Project involved in this matter. That project was advertised in February 2005, and the response date for proposals for the project was March 3, 2005. [Exhibit 4][Testimony of Kevin Rust (Tr., Vol. IV, pp. 123 - 124)]

25. The Selection Committee for the Harrison County Project consisted of Kevin Rust (User Division), Brad Eldridge (User Division), Patty Dunaway (Secretary's Pool), Mike Bezold (Secretary's Pool), and Harvey Pelley (Governor's Pool). [Exhibit 4]

26. The Evaluation Factors, and the weights assigned to those factors, listed in the Procurement Bulletin for this Harrison County Project were:

- Relative experience of consultant personnel assigned to project team with highway projects or projects for KTC, and/or for federal, local, or other state government agencies (10 points)
- Capacity to comply with project schedule (10 points)
- Past record of performance on project of similar type and complexity (10 points)
- Project approach and proposed procedures to accomplish the services for the project (10 points)

- Consultant's Kentucky offices where work is to be performed (2 points)

[Exhibit 4]

27. Twenty-four (24) consulting firms submitted proposals in response to the Harrison County Project Procurement Bulletin. Brighton/DLZ was one of those firms; Brighton/DLZ's proposal was submitted under the name of Brighton Engineering. KZF was not one of those firms. [Exhibits 11 & 12]

28. The Selection Committee meeting for the Harrison County Project occurred on March 23, 2005. All voting members of the Selection Committee were present for the meeting. [Exhibit 11][Testimony of Brad Eldridge (Tr., Vol. IV, p. 53)]

29. The final vote by the Selection Committee for the Harrison County Project ranked the top three consulting firms as follows:

- 1<sup>st</sup> – Birch Trautwein & Mims
- 2<sup>nd</sup> – Brighton Engineering
- 3<sup>rd</sup> – Tetra Tech

[Exhibit 11][Testimony of Brad Eldridge (Tr., Vol. IV, p. 53 - 54)]

### **C.2. Northern Kentucky Project**

30. At the same time as the Procurement Bulletin was issued for the Harrison County Project, a Procurement Bulletin was issued by the Transportation Cabinet for Item Numbers 6-203, 6-204, and 6-205, which was soliciting proposals for three highway projects in Northern Kentucky (Boone, Kenton, and Campbell Counties) ("Northern Kentucky Project"). The response date for those proposals was March 3, 2005. [Exhibit 8]

31. The Professional Engineering and Related Services Selection Committee for the Northern Kentucky Project consisted of Kevin Rust (User Division), Brad Eldridge (User Division), Chuck Allen (Secretary's Pool), Mike Bezold (Secretary's Pool), and John Stone (Governor's Pool). [Exhibit 8]

32. A consulting firm named KZF was one of the firms that submitted a proposal in response to the Procurement Bulletin for the Northern Kentucky Project. A consulting firm named Municipal Engineering was also one of the firms that submitted a proposal for the Northern Kentucky Project.

#### D. Brighton / DLZ

33. Brighton Engineering was a long-standing architecture and engineering firm in Frankfort, Kentucky. Will May and his wife Karen were the owners of that company, which had been founded by Mr. May's father. [Testimony of Scott Crosbie (Tr., Vol. I, p. 58); testimony of Will May (Tr., Vol. IV, p. 88)]

34. DLZ, a large regional engineering firm, purchased Brighton Engineering from Will and Karen May on March 15, 2004. Brighton Engineering retained its name for a while after the purchase, but then became DLZ Kentucky. Brighton Engineering may have retained its name for as much as a year after its purchase by DLZ. [Testimony of William S. May (Tr., Vol. IV, pp. 88 - 89); testimony of Scott Crosbie (Tr., Vol. I, p. 59)]

35. Mr. May is President of DLZ Kentucky, which is located in Frankfort, Kentucky. [Testimony of William S. May (Tr., Vol. IV, pp. 87 - 88)]

36. Brighton Engineering was a prequalified firm to do business with the Transportation Cabinet, as is DLZ Kentucky. [Testimony of William S. May (Tr., Vol. IV,

p. 89); testimony of David Jones (Tr., Vol. II, pp. 99 - 100); testimony of Brad Eldridge (Tr., Vol. IV, p. 69)]

**E. Attempts to Influence Selection Committee Members for the Harrison County Project and the Northern Kentucky Project**

37. At the times relevant to this matter, Sam Beverage was the State Highway Engineer for the Transportation Cabinet and was stationed in Frankfort. David Jones was a Deputy State Highway Engineer for the Transportation Cabinet and was stationed in Frankfort. Mike Bezold was a Transportation Engineer in District 6 (Northern Kentucky) for the Transportation Cabinet. Brad Eldridge was a Location Engineer in the Frankfort Office for the Transportation Cabinet. Kevin Rust was the Branch Manager for Preconstruction in District 6 (Northern Kentucky) for the Transportation Cabinet.

38. Although there is a great deal of disagreement among the witnesses regarding many of the facts surrounding the attempts made to influence the members of the Selection Committees for the Harrison County Project and the Northern Kentucky Project, certain basic facts are undisputed.<sup>4</sup>

39. In March 2005, State Highway Engineer Sam Beverage talked with Deputy State Highway Engineer David Jones about getting some work for an engineering firm named KZF. [Testimony of David Jones (Tr., Vol. II, pp. 26 - 27); testimony of Sam Beverage (Tr., Vol. II, pp. 124 - 125)]

40. As a result of that conversation, Mr. Jones contacted Mike Bezold, who was one of the members of the Selection Committee for the Northern Kentucky Project

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<sup>4</sup>Many of the disputed facts will be discussed in more detail below.

for which KZF had submitted a proposal. That contact occurred during the week of March 15, 2005. Mr. Jones asked Mr. Bezold to select KZF for the Northern Kentucky Project. Mr. Bezold's understanding of this conversation was that Mr. Jones wanted Mr. Bezold to try to have KZF get the contract for this Northern Kentucky Project. [Testimony of David Jones (Tr., Vol. II, pp. 26 - 27); testimony of Mike Bezold (Tr., Vol. III, pp. 242 - 244, 253)]<sup>5</sup>

41. Prior to the conversation with Mr. Jones, Mr. Bezold had reviewed the proposals that had been submitted for the Northern Kentucky Project and had assigned his preliminary scores to the proposals; those scores did not place KZF in the top three firms. As a result of his conversation with Mr. Jones, Mr. Bezold revised his preliminary scores and assigned KZF the top score, making it the first of his top three firms.

[Testimony of Mike Bezold (Tr., Vol. III, pp. 244 - 246)]

42. Shortly after Mr. Jones's conversation with Mr. Bezold, Mr. Beverage talked with Mr. Jones a second time and said that he had made a mistake with the name of the engineering firm for which he wanted to get work. The engineering firm was not KZF but was DLZ. [Testimony of David Jones (Tr., Vol. II, pp. 28 - 31, 66)]

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<sup>5</sup>One area of disagreement regarding these events is the question of whether Mr. Jones mentioned Mr. Beverage's name in his conversation with Mr. Bezold. Mr. Jones testified that he told Mr. Bezold that Mr. Beverage wanted to see KZF selected for the Northern Kentucky Project. [Testimony of David Jones (Tr., vol. II, p. 271)] Mr. Bezold testified, however, that Mr. Jones gave no reason for the request, that Mr. Jones did not indicate that he was making the request on behalf of anyone else, and that Mr. Jones did not mention Mr. Beverage's name in connection with the request. [Testimony of Mike Bezold [Tr., Vol. III, pp. 244, 253, 263] The Hearing Officer finds that Mr. Bezold's testimony regarding this question is credible, because there would have been no reason for Mr. Bezold to state that Mr. Beverage's name had not been mentioned if, in fact, Mr. Jones had mentioned Mr. Beverage's name. On the contrary, the use of Mr. Beverage's name would have supported Mr. Bezold's statement that he was just doing what he had been told to do by those who were higher in authority in the Cabinet.

43. As a result of that second conversation with Mr. Beverage, Mr. Jones contacted Mike Bezold a second time. Mr. Jones told Mr. Bezold that he had made a mistake and that he did not want KZF to be selected for the Northern Kentucky Project. Rather, he wanted Municipal Engineering to be selected for the Northern Kentucky Project.<sup>6</sup> In addition, Mr. Jones told Mr. Bezold that he wanted DLZ to be selected for the Harrison County Project. Mr. Bezold responded that Municipal Engineering would not be a problem, because Mr. Bezold's original preliminary scoring of the Northern Kentucky Project had placed Municipal Engineering first on his list. Mr. Bezold also responded that he would see what he could do for the Harrison County Project.<sup>7</sup>

[Testimony of Mike Bezold (Tr., Vol. III, p. 246); testimony of David Jones (Tr., Vol. II, pp. 31, 66 - 69)]

44. After this second conversation with Mr. Jones, Mr. Bezold reviewed his preliminary scores for the Harrison County Project and changed his scores so that DLZ would be ranked first among his top three firms. [Testimony of Mike Bezold (Tr., Vol. III, p. 247)]

45. In both of his conversations with Mr. Bezold, Mr. Jones did not indicate why he wanted Mr. Bezold to select the firms that Mr. Jones mentioned. Neither did Mr. Jones mention anything regarding the firm's experience, capacity, record of

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<sup>6</sup>During his testimony, Mr. Jones was not asked about this request to Mr. Bezold to favor Municipal Engineering for the Northern Kentucky Project.

<sup>7</sup>Mr. Jones testified that he did not ask Mr. Bezold to select DLZ for the project or, if Mr. Bezold had already made his selection, to change his selection for the project. He testified that he simply told Mr. Bezold that Mr. Beverage had a preference for DLZ. [Testimony of David Jones (Tr., Vol. II, pp. 31, 66 - 69)] The Hearing Officer gives greater weight to the testimony of Mr. Bezold, because, whatever exact words were used, Mr. Bezold clearly had the impression that he was being asked to select the firms that were mentioned by Mr. Jones.

performance, or project approach. Mr. Jones made no suggestion to Mr. Bezold that Mr. Bezold would get something in return for selecting the firms mentioned by Mr. Jones. Both of Mr. Bezold's conversations with Mr. Jones regarding the Selection Committees were very brief conversations. [Testimony of Mike Bezold (Tr., Vol. III, pp. 244, 253 - 254, 263, 266 - 267, 270)]

46. Mr. Jones also contacted Brad Eldridge, another member of the Selection Committee for the Harrison County Project, some time around the middle of March 2005. Mr. Jones asked Mr. Eldridge to favor Brighton Engineering for the Harrison County Project.<sup>8</sup> [Testimony of Brad Eldridge (Tr., Vol. IV, pp. 21 - 24); testimony of David Jones (Tr., Vol. II, pp. 31 - 32, 69)]

47. Mr. Jones did not give Mr. Eldridge a reason for this request. Neither did Mr. Jones provide Mr. Eldridge with any information regarding any of the evaluation factors used to evaluate the firms that responded to the Procurement Bulletin. Mr. Eldridge was not promised anything or threatened by anything in connection with Mr. Jones's request. [Testimony of Brad Eldridge (Tr., Vol. IV, pp. 27 - 28, 35, 68 - 69)]

48. As a result of his conversation with Mr. Jones, Mr. Eldridge changed his rating for Brighton Engineering and rated it as number one among the firms that had

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<sup>8</sup>Although Mr. Jones indicated that he told Mr. Eldridge that Mr. Beverage wanted to have DLZ selected for this project, Mr. Eldridge testified that Mr. Jones did not mention anyone else's name when he made this request to Mr. Eldridge. [Testimony of Brad Eldridge (Tr., Vol IV, p. 64)] Mr. Eldridge stated that neither Mr. Beverage's name nor Commissioner Williams's name was mentioned by Mr. Jones in this conversation. [Testimony of Brad Eldridge (Tr., Vol IV, p. 68)] The Hearing Officer finds that Mr. Eldridge's testimony regarding this question is credible, because there would have been no reason for Mr. Eldridge to state that Mr. Beverage's name had not been mentioned if, in fact, Mr. Jones had mentioned Mr. Beverage's name. On the contrary, the use of Mr. Beverage's name would have supported Mr. Eldridge's statement that he was just doing what he had been told to do by those who were higher in authority in the Cabinet.

submitted proposals for the Harrison County Project.<sup>9</sup> [Testimony of Brad Eldridge (Tr., Vol. IV, pp. 31 - 32)]

49. Mr. Jones's conversations with Mr. Bezold and Mr. Eldridge occurred before the Selection Committees met to make their selections for the Harrison County Project and the Northern Kentucky Project. [Testimony of David Jones (Tr., Vol. II, p. 34)]

50. Kevin Rust was also a member of the Selection Committee for the Harrison County Project. Both Mr. Bezold and Mr. Eldridge told Mr. Rust that they had been approached by Mr. Jones in an attempt to influence their selection for the Harrison County Project. As a result of receiving that information, Mr. Rust filed a complaint with the Office of Inspector General in the Transportation Cabinet some time after the Selection Committee meeting. [Testimony of Mike Bezold (Tr., Vol. III, p. 246); testimony of Brad Eldridge (Tr., Vol. IV, pp. 36 - 37); testimony of Kevin Rust (Tr., Vol. IV, pp. 128 - 129)]

51. The Executive Branch Ethics Commission charged both Mr. Jones and Mr. Beverage with violating the Executive Branch Code of Ethics by their actions of attempting to influence the members of the Selection Committees for the Northern

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<sup>9</sup>Mr. Jones testified that he did not ask Mr. Eldridge to select DLZ for the project or, if Mr. Eldridge had already made his selection, to change his selection for the project. He testified that he simply told Mr. Eldridge that Mr. Beverage had a preference for DLZ. Mr. Jones also stated that he told Mr. Eldridge that, if this bothered Mr. Eldridge in any way, Mr. Eldridge should just ignore it. [Testimony of David Jones (Tr., Vol. II, pp. 31 - 32, 69)] The Hearing Officer gives greater weight to the testimony of Mr. Eldridge, because, whatever exact words were used, Mr. Eldridge clearly had the impression that he was being asked to select DLZ for the project. Moreover, Mr. Eldridge was concerned enough about Mr. Jones's request that he told Kevin Rust about the request. [Testimony of Brad Eldridge (Tr., Vol. IV, pp. 36 - 37)]

Kentucky Project and the Harrison County Project. Both Mr. Jones and Mr. Beverage reached settlement agreements with the Commission regarding those charges.

**F. Allegation Made Against Commissioner Williams**

52. The allegation made against Commissioner Williams is that Commissioner Williams directed Sam Beverage to influence members of the Selection Committee for the Harrison County Project to select Brighton/DLZ for the Harrison County Project.

53. The chain of events connected with this allegation is that Mr. Beverage contacted Mr. Jones, and that Mr. Jones then contacted Mr. Bezold and Mr. Eldridge, because Commissioner Williams allegedly had first directed Mr. Beverage to influence the Selection Committee for the Harrison County Project to select Brighton/DLZ for the project.

54. The only direct evidence regarding this allegation is the testimony of Sam Beverage.

55. Mr. Beverage testified that Commissioner Williams came into his office one day, probably in March 2005, and handed him a piece of paper, which was a copy of a Procurement Bulletin that was on the internet for the consultant's use in preparing a proposal. Mr. Beverage also testified that Mr. Williams told Mr. Beverage that Mr. Williams had had discussions with Dave Disponett of the Governor's office, and that they would like help in directing work toward a particular engineering firm named DLZ. [Testimony of Sam Beverage (Tr., Vol. II, pp. 123 - 124; Vol. III, pp. 190 - 191)]

56. Mr. Beverage testified that he was confused by Commissioner Williams's use of the name DLZ and thought that the firm that Commissioner Williams was

requesting help for was KZF. [Testimony of Sam Beverage (Tr., Vol. II, p. 124)]

57. Mr. Beverage stated that he then contacted Mr. Jones, as discussed above, because Commissioner Williams had contacted him and had asked for his help.

58. Mr. Beverage indicated that Mr. Williams came into Mr. Beverage's office at a later date, after Mr. Beverage had contacted Mr. Jones, and asked how Mr. Beverage was progressing in helping DLZ. Mr. Beverage then realized his mistake, in that he had asked Mr. Jones to help KZF. Mr. Beverage immediately left his office and went to Mr. Jones's office to correct his mistake. [Testimony of Sam Beverage (Tr., Vol. II, pp. 125 - 126)]

59. Mr. Beverage testified that Commissioner Williams never asked him to contact the Selection Committee members. [Testimony of Sam Beverage (Tr., Vol. II, p. 135)] He also testified that Commissioner Williams did not ask him to try to change the votes of the Selection Committee members. [Testimony of Sam Beverage (Tr., Vol. III, p. 176)] He also testified that Commissioner Williams did not direct him to have the Selection Committee members influenced in favor of DLZ for the Harrison County Project. [Testimony of Sam Beverage (Tr., Vol. III., p. 208)] He also testified that Commissioner Williams wanted him to try to get DLZ the work and that the only way to get work for DLZ was through the Selection Committee process. [Testimony of Sam Beverage (Tr., Vol. III., pp. 218 - 219)]

60. The Respondent asserts that this testimony by Mr. Beverage, even if believed, does not prove that Commissioner Williams is guilty of the action charged against him, *i.e.*, that Commissioner Williams directed Mr. Beverage to influence members of the Selection Committee for the Harrison County Project to select

Brighton/DLZ for the project. The Hearing Officer agrees that Mr. Beverage testified that Commissioner Williams did not direct him to influence members of the Selection Committee for the Harrison County Project. On the other hand, Mr. Beverage also testified that Commissioner Williams told Mr. Beverage that Commissioner Williams wanted help in directing work toward DLZ. Because the only way to direct work toward a particular firm would be through the Selection Committee process, any request to direct work toward a particular firm would have to include, of necessity, a request to influence Selection Committee members to select the particular firm. Accordingly, the Hearing Officer finds that such an alleged statement by Commissioner Williams (that he wanted help in directing work toward DLZ), if true, would constitute "directing" Mr. Beverage to influence members of the Selection Committee to select Brighton/DLZ for the Harrison County Project.

61. The next issue to address, then, is whether Mr. Beverage's testimony regarding this statement by Commissioner Williams is credible. The Respondent asserts that Mr. Beverage's testimony is not credible and, therefore, that the Complainant has failed to prove the allegation made against Commissioner Williams by clear and convincing evidence. In response, the Complainant asserts that, because Commissioner Williams did not testify in this matter, Mr. Beverage's testimony is uncontroverted and therefore must be accepted at face value. The Hearing Officer disagrees with the Complainant's position on this issue. First, even though Mr. Beverage's testimony was not controverted by Commissioner Williams, who chose not to testify in this matter, a significant portion of Mr. Beverage's testimony was controverted by other witnesses. Second, it is the Hearing Officer's responsibility to

judge the credibility of the testimony of each and every witness. That is especially the case in a situation such as this proceeding, in which the Respondent has directly challenged the credibility of Mr. Beverage's testimony.

62. Accordingly, the Hearing Officer will examine the credibility of Mr. Beverage's testimony in this matter. There are seven issues regarding the credibility of Mr. Beverage, which the Hearing Officer will address in turn.

**F.1. Credibility of Sam Beverage: Prior False Statements and False Testimony**

63. The first issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether Mr. Beverage has provided any prior false statements and false testimony.

64. Mr. Beverage has been interviewed, apparently under oath, by different investigators regarding the matters at issue in this proceeding. Mr. Beverage has admitted that he has given different versions of the facts to those investigators, and that some of the facts as stated to those investigators were not true. [Testimony of Sam Beverage (Tr., Vol. III, pp. 227 - 229)] Accordingly, the Hearing Officer finds that Mr. Beverage has provided prior false statement regarding the matters at issue in this proceeding.

65. On May 11, 2006, the Franklin Circuit Court Grand Jury returned an Indictment against Mr. Beverage charging Perjury in the First Degree. The Indictment charged Mr. Beverage with committing perjury on August 30, 2005, when he provided testimony before a Special Grand Jury conducting a criminal investigation into alleged state merit system law violations. On June 11, 2007, Mr. Beverage entered a plea of

guilty to an amended charge of Official Misconduct in the First Degree, which resolved the perjury charge. [Exhibit 7] [Testimony of Sam Beverage (Tr., Vol. III, pp. 184 - 186)]

66. These facts indicate that Mr. Beverage is willing to lie when he is questioned under oath about his conduct and about the conduct of others, which makes Mr. Beverage's testimony in the current proceeding suspect and contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

**F.2. Credibility of Sam Beverage: Inconsistency Between Testimony and Settlement Agreement**

67. The second issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether Mr. Beverage's testimony at the hearing in this proceeding was consistent with the Settlement Agreement that he entered into with the Executive Branch Ethics Commission.

68. On April 10, 2006, the Executive Branch Ethics Commission issued an Initiating Order, with attached Allegation of Violation, against Mr. Beverage. Mr. Beverage signed a Settlement Agreement regarding that Initiating Order with the Commission on November 20, 2006. [Exs. 5 & 6]

69. In that Settlement Agreement, Mr. Beverage admitted that the factual allegations as set forth in the Commission's Initiating Order of April 10, 2006, are accurate. There were two factual allegations in the Initiating Order to which Mr. Beverage admitted:

- a. On or about March 16, 2005, through March 23, 2005, Mr. Beverage used or attempted to use his influence and/or official position in directing a Deputy State Highway Engineer to use or attempt to use his influence and/or official position to influence a Consultant Selection

Committee member during an open selection process relating to Items No. 6-203.00, 6-204.00, 6-205.00, Transportation Cabinet projects located in Boone, Kenton, and Campbell Counties, for the benefit of an outside consulting firm. Such actions contradict the statutes, regulations, and policies established for the purpose of removing favoritism and outside influence from the selection process and are in derogation of the state and public interest at large.

- b. On or about March 16, 2005, through March 23, 2005, Mr. Beverage used or attempted to use his influence and/or official position in directing a Deputy State Highway Engineer to use or attempt to use his influence and/or official position to influence Consultant Selection Committee members during an open selection process relating to Item No. 6-1052.06, a Transportation Cabinet project located in Harrison County, for the benefit of an outside consulting firm. Such actions contradict the statutes, regulations, and policies established for the purpose of removing favoritism and outside influence from the selection process and are in derogation of the state and public interest at large.

[Exs. 5 & 6]

70. Thus, Mr. Beverage admitted to: (a) directing a Deputy State Highway Engineer (Mr. Jones) to influence a Selection Committee Member to select a particular outside consulting firm for the Northern Kentucky Project; and (b) directing a Deputy State Highway Engineer (Mr. Jones) to influence Selection Committee Members to select a particular outside consulting firm for the Harrison County Project.

71. At the hearing in this matter, however, Mr. Beverage testified that the charges to which he admitted in the Settlement Agreement were absolutely incorrect, because he never directed a Deputy State Highway Engineer (Mr. Jones) to do anything in the matters charged. He later testified, however, that it was the first charge that was incorrect, but that the second charge applied to him. He further testified, however, that he influenced Mr. Jones, but that he never influenced Mr. Jones to influence the Selection Committee, because Mr. Jones did that on his own initiative and

not at Mr. Beverage's direction. He further testified that he did nothing to try to influence anyone on the projects, and that he did not direct Mr. Jones to do anything on the projects. [Testimony of Sam Beverage (Tr., Vol. III, pp. 181 - 182, 184, 189 - 190, 201 - 204)]

72. The Hearing Officer finds that all of Mr. Beverage's testimony on this issue is inconsistent with his admissions in the Settlement Agreement that he signed regarding the allegations that were brought against him by the Commission.

73. Although the Complainant asserts that Mr. Beverage's testimony is credible because Mr. Beverage took responsibility for his actions in this matter by entering into the Settlement Agreement with the Commission, the Hearing Officer finds that Mr. Beverage's testimony clearly indicates that he has not taken responsibility for his participation in this matter. Rather, Mr. Beverage places responsibility for this matter on Commissioner Williams and on Mr. Jones, and specifically denies that he directed Mr. Jones to do anything regarding influencing Selection Committee members. Moreover, Mr. Beverage's failure to accept responsibility for his actions in this matter, as related in his testimony in this proceeding, is totally inconsistent with his Settlement Agreement with the Commission. Such inconsistency between his testimony in this proceeding and his Settlement Agreement with the Commission contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.<sup>10</sup>

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<sup>10</sup>In its Reply Brief, the Complainant asserts that the Respondent has failed to supply a motive for Mr. Beverage's dishonesty. The Hearing Officer finds that the lack of a known motive for dishonesty is not necessary if the facts show that the dishonesty exists. In this case, however, Mr. Beverage has demonstrated one possible motive for his dishonesty: he wishes to deny responsibility for the actions involved in this matter and to place the responsibility for those actions on Commissioner Williams and on Mr. Jones.

**F.3. Credibility of Sam Beverage: Prior Attempts to Influence Selection Committee Members**

74. The third issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether Mr. Beverage has attempted to influence Selection Committee members on prior occasions, and whether he testified truthfully about that issue at the hearing in this proceeding.

75. Mr. Beverage was the Chief District Engineer in District 6 (Northern Kentucky) during the administration of Governor Paul Patton. Commissioner Williams was not the Commissioner of Highways at that time. [Testimony of Sam Beverage (Tr., Vol. III, pp. 168 - 169)]

76. Mr. Beverage testified that, while he was the Chief District Engineer in District 6, he did not request that Kevin Rust, as a member of a Selection Committee, re-rank consultants on a particular project within the district. [Testimony of Sam Beverage (Tr., Vol. III, pp. 169 - 171)]

77. Kevin Rust's testimony was contrary to Mr. Beverage's on this issue. Mr. Rust testified that, in 2002, during the administration of Governor Patton, Mr. Rust was on a Selection Committee regarding a project in Boone County. At that time, Mr. Beverage was Chief District Engineer for the Northern Kentucky District. Mr. Beverage called Mr. Rust to Mr. Beverage's office and told Mr. Rust that a specific engineering firm needed to be chosen for the Boone County project. Mr. Rust told his supervisor about the conversation with Mr. Beverage, and Mr. Rust's supervisor told him to ignore what Mr. Beverage had said and to vote for the firms that he wanted to vote for. Immediately after the Selection Committee meeting, Mr. Beverage called Mr. Rust to

Mr. Beverage's office and asked Mr. Rust which firm had been selected for the job. Mr. Rust gave Mr. Beverage the name of the selected firm, which was not the firm the Mr. Beverage had asked Mr. Rust to select. Mr. Beverage asked Mr. Rust if Mr. Rust had voted for the firm that Mr. Beverage had asked him to select, and Mr. Rust told him that he had not. [Testimony of Kevin Rust (Tr., Vol. IV, pp. 110 - 112)]

78. Mr. Rust also testified that, a month or two after that incident, Mr. Rust was on the Selection Committee for a large Northern Kentucky bridge project. Prior to the Selection Committee meeting, Mr. Beverage called Mr. Rust to Mr. Beverage's office and asked Mr. Rust which firm he had selected for the project. After Mr. Rust gave Mr. Beverage the name of the firm that he had selected. Mr. Beverage responded, "That will work." [Testimony of Kevin Rust (Tr., Vol. IV, pp. 113 - 115)]

79. The Hearing Officer finds that Mr. Rust's testimony is very credible. Specifically, the Hearing Officer finds that Mr. Rust is clearly an individual of integrity who finds attempts to influence the Selection Committee process to be unacceptable. The Hearing Officer bases this finding not only on Mr. Rust's testimony regarding these incidents in 2002 but also on the fact that, once Mr. Rust learned of Mr. Jones's attempts to influence Mr. Bezold and Mr. Eldridge, Mr. Rust reported that conduct to the Office of the Inspector General.

80. On the contrary, Mr. Beverage is an individual with a history of untruthfulness, as discussed above.

81. For these reasons, the Hearing Officer finds that Mr. Beverage made two attempts in 2002 to influence Selection Committee member Kevin Rust. In addition, the Hearing Officer finds that Mr. Beverage did not tell the truth when he testified during the

hearing in this proceeding that he did not make those attempts to influence Mr. Rust.

82. These facts make Mr. Beverage's assertions that he had only a secondary and peripheral involvement in the attempts to influence Selection Committee members in this matter, and that he acted only in response to Commissioner Williams's request, less credible, and contribute to the finding that Mr. Beverage's testimony in this proceeding is not credible.

**F.4. Credibility of Sam Beverage: Other Attempts to influence the Harrison County and Northern Kentucky Projects**

83. The fourth issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether Mr. Beverage made other attempts to influence the Harrison County Project and the Northern Kentucky Project. There are two matters connected with this issue, which the Hearing Officer will address in turn.

84. The first matter that the Hearing Officer will discuss is the dividing of a large Harrison County bridge project into three smaller projects. There were three Transportation Cabinet bridge projects in Harrison County at the beginning of 2005. These were small projects, so initially they were going to be combined into one larger project. District 6 personnel prepared an advertisement for the combined project and submitted it to the Central Office, probably in January 2005. After District 6 had prepared and submitted the advertisement, probably in the third week in January, David Jones contacted Kevin Rust in District 6 and asked that the combined project be split into three smaller projects that could then be advertised separately. Mr. Rust asked why this was being done, since it would be more inefficient to have three small projects rather than one larger project. Mr. Jones responded that Sam Beverage wanted to

spread the work around. Mr. Jones did not mention Commissioner Williams's name in that conversation. [Testimony of Kevin Rust (Tr., Vol. IV, pp. 117 - 120)] The three bridge projects in Harrison County were then advertised separately, in February 2005. One of those Harrison County bridge projects was the Harrison County Project involved in this matter. [Testimony of Kevin Rust (Tr., Vol. IV, pp. 123 - 124)] There is no evidence in the record that Commissioner Williams knew of the action of dividing the one larger project into three smaller projects.

This action demonstrates that Mr. Beverage was actively involved in making decisions regarding the Harrison County Project from the very beginning, and without any involvement by Commissioner Williams. In addition, this action makes Mr. Beverage's assertions that he had only a secondary and peripheral involvement in the attempts to influence Selection Committee members in this matter, and that he acted only in response to Commissioner Williams's request, less credible, and contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

85. The second matter that the Hearing Officer will discuss is Mr. Jones's request to Mr. Bezold to favor Municipal Engineering for the Northern Kentucky Project.

At the time that Mr. Jones contacted Mr. Bezold to correct the mistake of asking for KZF to be selected for the Northern Kentucky Project, Mr. Jones asked Mr. Bezold not only to favor DLZ for the Harrison County Project but also to now favor Municipal Engineering for the Northern Kentucky Project. [See discussion above.] Mr. Beverage testified that he mentioned Municipal Engineering to Mr. Jones in connection with the Northern Kentucky Project, but that it was just a general discussion regarding some of the smaller firms. He stated that there was nothing on his part to try to influence

anyone on the Northern Kentucky Project. [Testimony of Sam Beverage (Tr., Vol. III, pp. 203 - 204)] Whatever occurred in the discussions between Mr. Jones and Mr. Beverage regarding Municipal Engineering, there is no evidence of any involvement by Commissioner Williams in those discussions or in Mr. Jones's request to Mr. Bezold regarding Municipal Engineering.

Given these facts, the Hearing Officer finds that Mr. Beverage was actively involved in reviewing and commenting on the firms that had submitted proposals for the Northern Kentucky Project, all without any input or direction from Commissioner Williams. This action makes Mr. Beverage's assertions that he had only a secondary and peripheral involvement in the attempts to influence Selection Committee members in this matter, and that he acted only in response to Commissioner Williams's request, less credible, and contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

**F.5. Credibility of Sam Beverage: Inconsistencies Within Mr. Beverage's Own Testimony**

86. The fifth issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether there were inconsistencies within Mr. Beverage's own testimony at the hearing in this proceeding. There are three matters connected with this issue, which the Hearing Officer will address in turn.

87. The first matter that the Hearing Officer will address is Mr. Beverage's testimony regarding his job duties. Mr. Beverage testified that, when he was State Highway Engineer, he had no specific job duties. When asked more specifically about his job duties, Mr. Beverage responded that his job duties were to handle whatever

assignments the Commissioner gave him, to follow up on those assignments, and to get things done for the Commissioner. [Testimony of Sam Beverage (Tr., Vol. III, pp. 213 - 216)] When the Hearing Officer expressed surprise that Mr. Beverage had no specific job duties as State Highway Engineer, Mr. Beverage then indicated that he attended some association meetings for the Commissioner, traveled on behalf of the Commissioner, and signed the plans that were designed in the Transportation Cabinet. [Testimony of Sam Beverage (Tr., Vol. III, pp. 216 - 217)] Mr. Beverage's inconsistencies in answering the Hearing Officer's questions regarding his job duties, and his seeming inability or unwillingness to express what his job duties were while he was in the position of State Highway Engineer, contribute to the finding that Mr. Beverage's testimony in this proceeding is not credible.

88. The second matter that the Hearing Officer will address is Mr. Beverage's testimony regarding the control exerted by Commissioner Williams. Mr. Beverage testified that Commissioner Williams operated with an iron hand, and that he ran the entire organization almost singlehandedly. Mr. Beverage stated that the only decisions that were made were the decisions that Commissioner Williams made, and that Mr. Beverage had to run everything by Commissioner Williams to get the Commissioner's approval. All of the decisions had to be made by the Commissioner or through the Commissioner. [Testimony of Sam Beverage (Tr., Vol. II, pp. 127, 139)]

On the other hand, Mr. Beverage testified that he was interested in Economic Development and that, on his own initiative, he assumed duties to help promote several projects in the area of Economic Development. He did not discuss his assumption of those duties with Commissioner Williams. [Testimony of Sam Beverage (Tr., Vol. III, p.

217)]

Mr. Beverage's action of not discussing his assumption of certain Economic Development duties with Commissioner Williams is clearly inconsistent with Mr. Beverage's testimony that Commissioner Williams operated with an iron hand and that all decisions had to be made by the Commissioner or through the Commissioner. This inconsistency makes Mr. Beverage's assertions that he had only a secondary and peripheral involvement in the attempts to influence Selection Committee members in this matter, and that he acted only in response to Commissioner Williams's request, less credible, and contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

89. The third matter that the Hearing Officer will address is Mr. Beverage's testimony regarding Commissioner Williams's contact with Mr. Beverage regarding DLZ and the Harrison County Project.

Mr. Beverage testified that his job was to get things done for the Commissioner, that he needed to do whatever was necessary to make things happen, and that that is what he tried to do in this matter. [Testimony of Sam Beverage (Tr., Vol. II, pp. 127, 135)]

Mr. Beverage also testified that, when Commissioner Williams came to Mr. Beverage's office to discuss the Harrison County Project, Commissioner Williams had a copy of the Procurement Bulletin that was on the internet for the consultant's use in preparing a proposal, that Commissioner Williams gave Mr. Beverage that Procurement Bulletin, and that the name DLZ was written on that Procurement Bulletin. Despite the fact that DLZ was written on the Procurement Bulletin, Mr. Beverage assumed that that

was a mistake, and that the real firm for which Commissioner Williams was requesting help was KZF. Mr. Beverage stated that he came to that conclusion because he did not know of a firm named DLZ but knew of a firm named KZF that had done work previously in Harrison County. Mr. Beverage also testified that, while he knew of the firm Brighton Engineering, he did not know of the firm DLZ. [Testimony of Sam Beverage (Tr., Vol. II, pp. 124, 128; Vol. III, pp. 101 - 193, 211 - 212)]

The fact that Mr. Beverage went forward with trying to help KZF to get the Harrison County Project, even though DLZ was written on the Procurement Bulletin that he says he was given by Commissioner Williams, is inconsistent with Mr. Beverage's testimony that it was his job to do whatever was necessary to get things done for the Commissioner. If it were Mr. Beverage's job to get things done for the Commissioner, and if the Commissioner had asked Mr. Beverage to help DLZ, and if Mr. Beverage had seen the name DLZ written on the Procurement Bulletin, and if Mr. Beverage had not recognized the name of that firm and was confused by that lack of recognition, then surely Mr. Beverage would have expressed that confusion to Commissioner Williams, who supposedly was right there in Mr. Beverage's office, and who could have cleared up the confusion. Mr. Beverage's testimony that he simply assumed that the name DLZ really meant KZF, and that he went forward on that assumption, simply makes no sense if Commissioner Williams really were telling Mr. Beverage that he wanted Mr. Beverage to assist DLZ, and if Commissioner Williams really were in the same room with Mr. Beverage during that conversation, where he would have been available to clear up any confusion that Mr. Beverage had regarding the name of the firm.

The Hearing Officer finds that this inconsistency in Mr. Beverage's testimony

contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

**F.6. Inconsistencies Between Testimony of Sam Beverage and Testimony of David Jones**

90. The sixth issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether there were inconsistencies between Mr. Beverage's testimony and the testimony of David Jones. There are three matters connected with this issue, which the Hearing Officer will address in turn.

91. The first matter that the Hearing Officer will address is the copy of the Procurement Bulletin that Mr. Beverage stated Commissioner Williams gave to him, as discussed above. Mr. Beverage testified that he thought that he gave Mr. Jones the Procurement Bulletin that Commissioner Williams had given to Mr. Beverage.

[Testimony of Sam Beverage (Tr., Vol. III, p. 191)] Mr. Jones testified, however, that both of the requests by Mr. Beverage to Mr. Jones were made verbally; there was no written document presented to Mr. Jones regarding these requests. [Testimony of David Jones (Tr., Vol. II, pp. 63 - 64, 72)]

The Hearing Officer finds that Mr. Jones's testimony is credible on this point. If Mr. Beverage had given Mr. Jones a copy of the Procurement Bulletin for the Harrison County Project, then Mr. Jones would have discovered that KZF had not submitted a proposal for the Harrison County Project, and Mr. Beverage's mistake of confusing KZF for DLZ would have been discovered. That never happened.

The Hearing Officer finds that Mr. Beverage's testimony is inconsistent with Mr. Jones's credible testimony on this matter. That inconsistency contributes to the finding

that Mr. Beverage's testimony in this proceeding is not credible

92. The second matter that the Hearing Officer will address is the first conversation between Mr. Beverage and Mr. Jones regarding the request for help for KZF. Mr. Beverage's recollection of the conversation with Mr. Jones was that Mr. Beverage told Mr. Jones that Commissioner Williams was requesting that they help KZF get some work in Harrison County. He said that the request was specific regarding the work that was wanted. He said that he also asked Mr. Jones what they might do, and that Mr. Jones responded that he knew the Selection Committee members and that he would talk with them. Mr. Beverage said that he asked Mr. Jones if he were sure that he wanted to do that, and Mr. Jones responded that the Committee members would not mind. Mr. Jones told Mr. Beverage that he would handle it. [Testimony of Sam Beverage (Tr., Vol. II, pp. 124 - 125, 138; Vol. III, p. 192)] Mr. Beverage testified that Mr. Jones took the initiative to contact the Selection Committee members. Mr. Beverage stated that he did not go to Mr. Jones with a specific plan in mind of how to help DLZ; he just passed on the interest that Commissioner Williams had expressed to him. [Testimony of Sam Beverage (Tr., Vol. II, pp. 135 - 136)] Mr. Beverage stated that he did not ask Mr. Jones to attempt to influence the Selection Committee members; that was Mr. Jones's suggestion. [Testimony of Sam Beverage (Tr., Vol. III, p. 175)]

Mr. Jones's recollection of the conversation with Mr. Beverage was that Mr. Beverage asked Mr. Jones to talk to some of the members of a Selection Committee to see if the Committee members would recommend an engineering firm named KZF. Mr. Beverage did not mention any specific project regarding KZF. In addition, Mr. Jones

gave no indication that Mr. Beverage mentioned Commissioner Williams's name in the conversation. [Testimony of David Jones (Tr., Vol. II, pp. 26 - 27, 62 - 63)] Mr. Jones also indicated that Mr. Beverage specifically mentioned Mike Bezold, who was a member of certain Selection Committees, as someone whom Mr. Jones should contact, because Mr. Beverage used to work with Mr. Bezold and Mr. Beverage had talked with Mr. Bezold about doing this kind of thing in the past. [Testimony of David Jones (Tr., Vol. II, pp. 83 - 84)]

Clearly, Mr. Beverage's recollection of this conversation and Mr. Jones's recollection of this conversation are significantly different. The Hearing Officer finds Mr. Jones's statement to be more credible than Mr. Beverage's statement, for several reasons. First, as to the question of which person suggested the Selection Committee members be contacted, there is no evidence that Mr. Jones had ever attempted to influence any Selection Committee member prior to this point, while the evidence indicates that Mr. Beverage had made such attempts, as discussed above. The Hearing Officer does not find it credible that Mr. Beverage had to be convinced that the action to take was to contact members of the Selection Committee.

Second, as to whether Mr. Beverage mentioned the specific Harrison County Project, the Hearing Officer finds that, if Mr. Beverage had mentioned this specific project, the error regarding the name of the firm would have been discovered very quickly, because KZF had not submitted a proposal for that project. Because the error was not discovered, the Hearing Officer finds that the credible evidence is that Mr. Beverage did not mention the name of the Harrison County Project to Mr. Jones.

Third, as to whether Mr. Beverage mentioned Commissioner Williams's name,

the Hearing Officer finds that there would have been no reason for Mr. Jones to delete that fact from his testimony if Mr. Beverage had in fact mentioned Commissioner Williams's name. On the contrary, mentioning Commissioner Williams's name would have supported Mr. Jones's claim that he was just doing what he had been told to do by those who were higher in authority in the Cabinet. For that reason, the Hearing Officer finds that the credible evidence is that Mr. Beverage did not mention Commissioner Williams's name when he discussed this matter with Mr. Jones.

In sum, and for the reasons stated, the Hearing Officer finds that Mr. Beverage's version of his first discussion with Mr. Jones is not credible. This lack of credibility contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

93. The third matter that the Hearing Officer will address is an alleged meeting with Commissioner Williams, Mr. Beverage, and Mr. Jones. Mr. Beverage testified that, after Commission Williams talked with Mr. Beverage the second time, and Mr. Beverage learned that he had mistaken KZF for DLZ, Mr. Beverage immediately left his office and went to Mr. Jones's office, to bring Mr. Jones to Mr. Beverage's office so that Commissioner Williams could tell Mr. Jones what the Commissioner wanted to have happen. Mr. Beverage stated that either he or Commissioner Williams corrected the mistake and told Mr. Jones that DLZ was the firm that they wanted to have helped. [Testimony of Sam Beverage (Tr., Vol. II, pp. 125 - 126)] Mr. Beverage also testified, however, that he is not very clear about what happened at that point, and that he doesn't exactly remember. He indicated that his memory may be incorrect regarding a meeting between Commissioner Williams and Mr. Jones. [Testimony of Sam Beverage

(Tr., Vol. III, pp. 194 - 195)].

Mr. Jones testified that there never was a meeting with Mr. Beverage, Mr. Jones, and Commissioner Williams in which Mr. Beverage asked Commissioner Williams to clear up the confusion regarding DLZ and KZF. [Testimony of David Jones (Tr., Vol. II, pp. 72 - 73)] When Mr. Beverage was asked to compare his testimony to that of Mr. Jones on this issue, Mr. Beverage stated that Mr. Jones would not necessarily be wrong in his recollection, and that Mr. Beverage didn't exactly remember what happened. [Testimony of Sam Beverage (Tr., Vol. III, p. 195)]

Given the uncertainties and confusion in Mr. Beverage's testimony regarding this alleged meeting, the Hearing Officer finds that Mr. Jones's testimony on this matter is credible and that there never was a meeting with Commissioner Williams, Mr. Beverage, and Mr. Jones. The inconsistency between Mr. Beverage's testimony and Mr. Jones's testimony regarding this matter, and the inconsistency within Mr. Beverage's testimony itself, contribute to the finding that Mr. Beverage's testimony in this proceeding is not credible.

**F.7. Credibility of Sam Beverage: No Consistent Testimony of Dave Disponett with Testimony of Mr. Beverage**

94. The seventh issue affecting the credibility of Mr. Beverage that the Hearing Officer will examine is whether the testimony of Dave Disponett was consistent with the testimony of Mr. Beverage.

95. In Mr. Beverage's testimony regarding his first conversation with Commissioner Williams regarding DLZ, Mr. Beverage stated that Commissioner Williams told Mr. Beverage that Commissioner Williams had had discussions with Dave

Disponett of the Governor's Office and that they wanted help in directing work to a particular engineering firm named DLZ. The question to address is whether Mr. Disponett had that type of discussion with Commissioner Williams.

96. Dave Disponett was an unpaid advisor in the administration of Governor Fletcher from March 2004 until May 2005. [Testimony of David Disponett (Tr., Vol. 1, pp. 82, 87)]

97. Some time after April 15, 2004, and before April 2005, Mr. Disponett scheduled a meeting at Republican Headquarters for two representatives of Brighton/DLZ, Mr. Will May and Mr. Pratap Rajadhyaksha, to meet with Mr. Disponett and John McCarthy, the Chairman of the Republican Party of Kentucky.<sup>11</sup> [Testimony of John McCarthy (Tr., Vol. I, pp. 31 - 32, 43 - 45, 52); testimony of David Disponett (Tr., Vol. I, pp. 82 - 83, 87, 89 - 90, 114 - 115); testimony of William S. May (Tr., Vol. IV, p. 96)] The purpose of this meeting was to discuss the process of obtaining contracts with the Transportation Cabinet through the state procurement process. Mr. May wanted to express his concern about the inequality in the system of awarding jobs to consultants. The only thing that Mr. May requested was fair treatment and the opportunity to meet with Governor Fletcher. [Testimony of David Disponett (Tr., Vol. I, pp. 92, 94, 115 - 116); testimony of John McCarthy (Tr., Vol. I, pp. 31 - 32)] Mr. May had prepared a spreadsheet to show what firms had gotten jobs in the previous three or

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<sup>11</sup>Witnesses had differing recollections regarding who was present at this meeting. Mr. McCarthy testified that Mr. May was not present at the meeting, although Mr. May and Mr. Disponett testified that Mr. May was present at the meeting. Mr. Disponett testified that Mr. Rajadhyaksha was not present at the meeting, although Mr. May and Mr. McCarthy testified that Mr. Rajadhyaksha was present at the meeting. The Hearing Officer finds that the preponderance of the evidence is that the meeting was attended by Mr. McCarthy, Mr. Disponett, Mr. May, and Mr. Rajadhyaksha.

four years, which he believed showed the inequality of Kentucky's system.

Brighton/DLZ was interested in discussing this information with the appropriate government officials to show them the inequality in the system. [Testimony of William S. May (Tr., Vol. IV, pp. 91 - 92, 102)] There was no discussion at this meeting regarding Brighton/DLZ wanting to obtain a Harrison County Project or regarding any particular project that Brighton/DLZ was interested in obtaining. [Testimony of William S. May (Tr., Vol. IV, p. 96); testimony of David Disponett (Tr., Vol. I, pp. 116 - 117)]

98. Some time after the meeting at Republican Headquarters, Mr. McCarthy and Mr. Disponett met with Commissioner Williams. The purpose of the meeting was for Mr. McCarthy and Mr. Disponett to learn about the procurement process, as well as to inform Commissioner Williams that there was a concern that one engineering firm was obtaining all of the procurement contracts. During the meeting, Mr. McCarthy indicated that he and Mr. Disponett were not there to represent any one individual or company. Mr. McCarthy told Commissioner Williams that Brighton/DLZ was the company that brought up the concern, but he also said that other firms had the same concern and that Mr. McCarthy and Mr. Disponett were not advocating the use of any particular company. [Testimony of John McCarthy (Tr., Vol. I, pp. 34 - 35, 45 - 47)] Mr. Disponett remembers that the conversation centered on engineering companies' concerns that the work at the Transportation Cabinet be spread around fairly. [Testimony of David Disponett (Tr., Vol. I, pp. 99 - 100)]. There was no mention in this meeting of the Harrison County Project or of any specific contracts with the state. [Testimony of John McCarthy (Tr., Vol. I, pp. 48 - 49); testimony of David Disponett (Tr., Vol. I, p. 122)]

99. Some time later, a meeting occurred with Governor Fletcher. That meeting was arranged by Scott Crosbie, an attorney and a lobbyist on behalf of DLZ. Mr. May, Mr. Rajadhyaksha, and Mr. Crosbie attended that meeting. The purpose of the meeting was for Mr. May to show Governor Fletcher the spreadsheet that he had prepared and to discuss the inequality of Kentucky's system of distributing work to engineering consultants. The meeting lasted approximately 20 minutes to a half hour. [Testimony of Scott Crosbie (Tr., Vol. I, pp. 56 - 57, 61 - 63, 76); testimony of William S. May (Tr., Vol. IV, pp. 91 - 93)] There was no mention of the Harrison County Project at the meeting with Governor Fletcher. [Testimony of Scott Crosbie (Tr., Vol. I, p. 77); testimony of William S. May (Tr., Vol. IV, p. 94)]

100. Directly after the meeting with Governor Fletcher, Mr. Crosbie, Mr. May, and Mr. Rajadhyaksha met Mr. Disponett, whose office was in the Capitol, and went to lunch at Serafini's restaurant with Mr. Disponett. During lunch, there was a general discussion regarding DLZ's background and capability, and about DLZ's desire to do engineering work for the state. There was no discussion regarding how DLZ should go about getting business from the state. [Testimony of Scott Crosbie (Tr., Vol. I, pp. 63 - 67)]

Mr. Crosbie testified that there was no discussion during that lunch regarding the Harrison County Project or any specific Transportation Cabinet projects. [Testimony of Scott Crosbie (Tr., Vol. I, pp. 69, 77)] Mr. May testified that he never had a conversation with Mr. Disponett regarding Brighton/DLZ being interested in obtaining the Harrison County Project. Mr. May knows of no one from Brighton/DLZ who ever met with anyone to express Brighton/DLZ's interest in obtaining the Harrison County

Project. [Testimony of William S. May (Tr., Vol. IV, pp. 95 - 97)] On the other hand, Mr. Disponett testified that the Harrison County Project ("something about twin bridges") was discussed at this lunch. He also testified, however, that he is unsure when he learned about the Harrison County Project. [Testimony of David Disponett (Tr., Vol. I, pp. 102, 123 - 124, 133 - 135)]

101. The Hearing Officer finds that the preponderance of the evidence is that Mr. Disponett did not learn of the Harrison County Project at the lunch at Serafini's. While Mr. Disponett's testimony was confused and uncertain on this point, the other participants in the lunch both testified clearly and credibly that the Harrison County Project was not discussed with Mr. Disponett.

102. Some time after the lunch at Serafini's, Mr. Disponett had another meeting with Commissioner Williams. No one else was present at the meeting, which occurred in Commissioner Williams's office. [Testimony of David Disponett (Tr., Vol. I, pp. 103 - 104, 125)] During this meeting, Mr. Disponett told Commissioner Williams what had been discussed at the lunch at Serafini's. He told Commissioner Williams that DLZ was a minority company and that it was not getting any work. While Mr. Disponett stated that he mentioned the Harrison County Project to Commissioner Williams, he also stated that he might not have known about the Project at the time of the meeting with Commissioner Williams. Mr. Disponett also testified that he would not have told Commissioner Williams that DLZ wanted that project, but, at another time in his testimony, he stated that he thought that he told Commissioner Williams that DLZ wanted the Harrison County Project. [Testimony of David Disponett (Tr., Vol. I, pp. 103 - 104, 128, 137)]

103. Mr. Disponett's testimony is so uncertain and inconsistent that it is hard to know exactly what he said to Commissioner Williams in this meeting. Given the Hearing Officer's finding that Mr. Disponett did not learn of the Harrison County Project during the lunch at Serafini's, the Hearing Officer finds that Mr. Disponett did not discuss the Harrison County Project with Commissioner Williams at this meeting. In any event, however, there is no testimony from Mr. Disponett that he ever told Commissioner Williams that he was interested in having work directed toward Brighton/DLZ.

104. For these reasons, the Hearing Officer finds that there is nothing in Mr. Disponett's testimony that is consistent with Mr. Beverage's statement that Commissioner Williams told Mr. Beverage that Mr. Disponett and the Commissioner were interested in having work directed to DLZ. This conclusion contributes to the finding that Mr. Beverage's testimony in this proceeding is not credible.

**F.8. Summary Regarding Credibility of Sam Beverage**

105. For all of the reasons stated above, the Hearing Officer finds that the testimony of Sam Beverage in this proceeding is not credible.

106. Given the serious nature of the credibility problems that the Hearing Officer has found with Mr. Beverage's testimony, and given the fact that Mr. Beverage is the only witness who provided any direct testimony against Commissioner Williams, the Hearing Officer finds that Mr. Beverage's testimony falls substantially short of the clear and convincing evidence that must exist for the Hearing Officer to find that Commissioner Williams is guilty of the allegation that the Complainant has issued against him. The evidence presented to the Hearing Officer was significantly less than

clear, direct, weighty, and convincing regarding the allegation issued against Commissioner Williams, and did not enable the Hearing Officer to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue

107. In sum, and for all of the reasons stated, the Hearing Officer finds that the Complainant has failed to prove, by clear and convincing evidence, that Commissioner Williams directed Mr. Beverage to influence Selection Committee members to select Brighton/DLZ for the Harrison County Project. Accordingly, the Hearing Officer finds that the Complainant has failed to prove, by clear and convincing evidence, the Allegation of Violation issued against Commissioner Williams in this case.

### **III. Conclusions of Law**

1. The Executive Branch Ethics Commission has jurisdiction in this matter pursuant to KRS Chapter 11A.

2. As Commissioner of the Department of Highways in the Transportation Cabinet, Marc D. Williams was subject to the requirements of the Executive Branch Code of Ethics found at KRS Chapter 11A and to the jurisdiction of the Executive Branch Ethics Commission.

3. The Commission alleges that Commissioner Williams has violated portions of the Executive Branch Code of Ethics, specifically KRS 11A.020(1)(b) and (d), which state:

(1) No public servant, by himself or through others, shall knowingly: . . .

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large; . .

- (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

4. The specific allegation against Commissioner Williams is that he directed State Highway Engineer Sam Beverage to influence members of a Selection Committee to select Brighton/DLZ for a Transportation Cabinet project located in Harrison County. The Commission alleges that such action by Commissioner Williams contradicts the statutes, regulations, and policies established for the purpose of removing favoritism and outside influence from the selection process and are in derogation of the state and public interest at large.

5. The burden of proof in this matter is on the Executive Branch Ethics Commission to prove the Allegation of Violation issued against Commissioner Williams by clear and convincing evidence. KRS 11A.100(3). The Hearing Officer recognizes that KRS 13B.090(7) provides that the burden of persuasion in all administrative hearings is met by a preponderance of the evidence, and that KRS 13B.020(1) states that the provisions of KRS Chapter 13B shall supersede any other provisions of Kentucky law "to the extent these other provisions are duplicative or in conflict" with KRS Chapter 13B. The Hearing Officer concludes, however, that the burden of proof stated in KRS 11A.100(3) is not in conflict with the burden of proof set forth in KRS 13B.090(7), because there is nothing in KRS Chapter 13B that prohibits an agency from providing *more* protection to a Respondent than that protection provided by KRS 13B. Therefore, the Hearing Officer concludes that the agency's own statute, which

applies a greater burden of proof to the Commission and provides more protection to a Respondent, is applicable and controls.

6. "Clear and convincing evidence" has been defined in Kentucky as follows:

We conclude that where the "burden of persuasion" requires proof by clear and convincing evidence, the concept relates more than anything else to an attitude or approach to weighing the evidence, rather than to a legal formula that can be precisely defined in words. Like "proof beyond a reasonable doubt," "proof by clear and convincing evidence" is incapable of a definition any more detailed or precise than the words involved. It suffices to say that this approach requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt.

*Fitch v. Burns*, Ky., 782 S.W.2d 618, 622 (1989). "Clear and convincing evidence" has also been described as "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Johns*, 529 A.2d 434, 441 (N.J. 1987)

7. Based on the above findings of fact, the Hearing Officer concludes that the Complainant has failed to prove, by clear and convincing evidence, that Commissioner Williams directed State Highway Engineer Sam Beverage to influence members of a Selection Committee to select Brighton/DLZ for a Transportation Cabinet project located in Harrison County. The evidence presented to the Hearing Officer fell substantially short of being clear, direct, weighty, and convincing regarding the allegation issued against Commissioner Williams, and did not enable the Hearing Officer to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

8. Because the Complainant has failed to prove the allegation issued against Commissioner Williams by clear and convincing evidence, the Hearing Officer concludes that Commissioner Williams should be found not guilty of the Allegation of Violation that has been issued against him in this case.

9. Based on these conclusions, the Hearing Officer normally would not address the Respondent's remaining legal arguments. The Hearing Officer recognizes, however, that she is not the final decision-maker in this matter. Therefore, in the event that the Executive Branch Ethics Commission would like to review the Respondent's remaining legal arguments, the Hearing Officer will address those arguments here.

10. The Respondent asserts that, even if the Commission had been able to prove the specific allegation against Commissioner, such conduct: (a) would not contradict the statutes, regulations, and policies established for the purpose of removing favoritism and outside influence from the selection process; and (b) is not in derogation of the state and public interest at large. The Hearing Officer will address each of these assertions in turn.

**A. Conduct that Contradicts Statutes, Regulations, and Policies**

11. The Respondent's first assertion is that the alleged conduct in this proceeding would not contradict the statutes, regulations, and policies established for the purpose of removing favoritism and outside influence from the selection process.

12. The general charge to the Selection Committee for Transportation Cabinet projects is stated in 600 KAR 6:060, Section 2(3)(a) and (b):

(a) The Professional Engineering Services Selection Committee shall give fair and impartial consideration to each response certified in accordance with KRS 45A.825(5).

(b) The Selection Committee shall utilize the evaluation factors and weights indicated in the announcement for each project to screen each certified firm response.

13. Thus, the goal of the Selection Committee is to select a consulting firm based on merit, *i.e.*, to make an informed decision regarding which consulting firm is the best firm for the particular project, based upon the evaluation factors and weights indicated in the Procurement Bulletin for the project.

14. The evaluation factors for the Harrison County Project were: (a) relative experience of consultant personnel assigned to project team with highway projects or projects for KTC, and/or for federal, local, or other state government agencies; (b) capacity to comply with project schedule; (c) past record of performance on project of similar type and complexity; (d) project approach and proposed procedures to accomplish the services for the project; and (e) consultant's Kentucky offices where work is to be performed. Being directed or influenced to select a particular consultant for the project is simply not part of any of the evaluation factors that were to be used to select the consultant for the project, and violates the directive to give fair and impartial consideration to each response that was submitted.

15. The Respondent asserts that, because it is not uncommon for the Professional Services Division to interrupt a Selection Committee meeting to inform the Selection Committee that one of the firms whose proposals are being reviewed has just been selected for another project by another Selection Committee, it also is acceptable under Transportation Cabinet policy for Transportation Cabinet employees to attempt to direct or influence members of the Selection Committee. The Hearing Officer disagrees. Informing Selection Committee members that a firm has been selected by

another Selection Committee is information within the category of "capacity" that the Selection Committee members may want and need to consider in making their selections. Being directed or influenced to select a particular firm, however, is a completely different kind of contact, and fits within none of the selection criteria.

16. In sum, the Hearing Officer concludes that the alleged conduct in this proceeding would contradict the statutes, regulations, and policies established for the purpose of removing favoritism and outside influence from the selection process.

**B. Conduct in Derogation of the State and Public Interest at Large**

17. The Respondent's second assertion is that the alleged conduct in this proceeding is not in derogation of the state and public interest at large, because Brighton/DLZ was qualified to perform the work for the Harrison County Project. Because Brighton/DLZ was fully competent to perform the work for which it was being considered, the Respondent asserts that any selection of Brighton/DLZ would not have been "in derogation of the state at large" or "in derogation of the public interest at large."

18. This argument misses the fact that all firms that are being considered by a Selection Committee for a project have been pre-qualified by the Transportation Cabinet. Thus, all firms are qualified to perform the work for the project for which a firm is being selected. The selection process exists in order to choose the most qualified firm for the project.

19. Moreover, the lack of competency of Brighton/DLZ to perform the work for the Harrison County Project is not what is alleged to have been the conduct that was in derogation of the state and public interest at large. Rather, the alleged conduct is the failure to follow the established procedure for choosing the most qualified firm for the

project.

20. That alleged failure to follow the established procedure for selecting the most qualified firm for the project is in derogation of the state at large and the public interest at large. The state and the public interest both are disparaged and shown disrespect when the established procedures for the fair and impartial selection of a firm for a Transportation Cabinet project are violated.

21. In sum, the Hearing Officer concludes that the alleged conduct in this proceeding is in derogation of the state at large and the public interest at large.

#### **IV. Recommended Order**

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer recommends that the Executive Branch Ethics Commission find the Respondent, Marc D. Williams, not guilty of the Allegation of Violation issued against him in this matter.

#### **V. Notice of Exception and Appeal Rights**

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Executive Branch Ethics Commission. Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. *See Rapier v. Philpot*, Ky., 130 S.W.3d 560 (2004).

The final Order of the Executive Branch Ethics Commission may be appealed pursuant to KRS 13B.140(1), which states:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean that a summons must be served upon filing an appeal in Circuit Court.

SO RECOMMENDED this 2<sup>nd</sup> day of May, 2008.



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ANN M. SHEADEL  
HEARING OFFICER  
1347 S. Third Street, Suite 202  
Louisville, Kentucky 40208  
502-384-8070  
ann.sheadel@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that the original of this FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER was hand-delivered this 5<sup>th</sup> day of May, 2008, to:

Daphne Criscillis  
Clerk for Administrative Proceedings  
Executive Branch Ethics Commission  
Vest-Lindsey House  
401 Wapping St.  
Frankfort, KY 40601

for filing; and that a true copy was hand-delivered to:

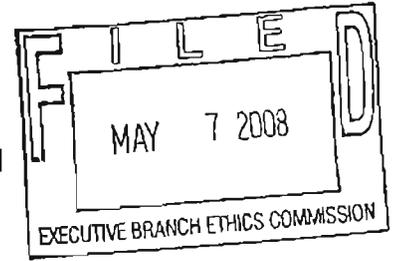
Jill LeMaster  
Executive Director  
Executive Branch Ethics Commission  
Vest-Lindsey House  
401 Wapping St.  
Frankfort, KY 40601

J. Guthrie True  
Johnson, True & Guarnieri  
326 West Main St.  
Frankfort, KY 40601



ANN M. SHEADEL  
HEARING OFFICER

COMMONWEALTH OF KENTUCKY  
EXECUTIVE BRANCH ETHICS COMMISSION  
CASE NO. 07-103



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

MARC D. WILLIAMS

RESPONDENT

\* \* \* \* \*  
**ORDER GRANTING RESPONDENT'S REQUEST TO CORRECT ERROR  
IN FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER**  
\* \* \* \* \*

This matter is before the Hearing Officer on the request of the Respondent that the Hearing Officer correct an error on page 21 of the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order. Specifically, in paragraph number 61 on page 21, a sentence reads, "The Hearing Officer disagrees with the Respondent's position on this issue." The Respondent is correct that that sentence is incorrect. The sentence should read, "The Hearing Officer disagrees with the Complainant's position on this issue."

Accordingly, IT IS HEREBY ORDERED:

1. The Hearing Officer grants the Respondent's request that the Hearing Officer correct the error in paragraph 61 on page 21 of the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order.
2. The sentence reading "The Hearing Officer disagrees with the Respondent's position on this issue" shall be changed to read "The Hearing Officer disagrees with the Complainant's position on this issue."
3. The Hearing Officer is attaching the corrected page 21 to this Order. That

corrected page 21 shall replace the incorrect page 21 in the Findings of Fact,  
Conclusions of Law, and Recommended Order.

SO ORDERED this 6<sup>th</sup> day of May, 2008.



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ANN M. SHEADEL  
HEARING OFFICER  
1347 S. Third Street, Suite 202  
Louisville, Kentucky 40208  
502-384-8070  
ann.sheadel@gmail.com

CERTIFICATE OF SERVICE

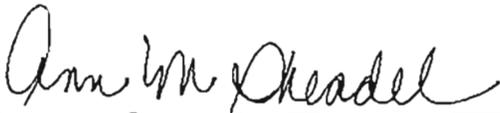
I hereby certify that the original of this ORDER GRANTING RESPONDENT'S REQUEST TO CORRECT ERROR IN FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER was mailed this 6<sup>th</sup> day of May, 2008, by first-class mail, postage prepaid, to:

Daphne Criscillis  
Clerk for Administrative Proceedings  
Executive Branch Ethics Commission  
Vest-Lindsey House  
401 Wapping St.  
Frankfort, KY 40601

for filing; and that a true copy was mailed by first-class mail, postage prepaid, to:

Jill LeMaster  
Executive Director  
Executive Branch Ethics Commission  
Vest-Lindsey House  
401 Wapping St.  
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326 West Main St.  
Frankfort, KY 40601



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ANN M. SHEADEL  
HEARING OFFICER