

March 17, 2022

Via: Electronic Mail
Town of Monterey Select Board

Steven Weisz: steve@montereyma.gov
John Weingold: johnweingold@gmail.com
Justin Makuc: justinmakuc@gmail.com

Re: Town of Monterey Confidential Report

Dear Select Board Members,

We write to report our findings for the investigation we undertook on behalf of the Town of Monterey (the “Town”) in regard to several complaints concerning Town employees, brought by both citizens and fellow employees.¹

Our role in this investigation is that of a fact finder. Our objective is to be impartial, precise, and thorough and to produce a fair and balanced report of our findings. Payment for our services is not contingent upon the outcome of the investigation, including whether we determined that inappropriate behavior occurred.

This report outlines the steps we took in reaching our findings, which included: reviewing the specific claims that prompted this investigation; interviewing witnesses; reviewing documents; and assessing the information obtained from persons with knowledge of the facts, as well as relevant background information.

A. Investigation Background

Independence. Independence is an important component of this investigation. We have no interest in the Town or the individuals involved. We knew none of the persons involved prior to commencing this investigation. No party was allowed to interfere with the findings in this Report.

Admonitions. We informed each witness that although we are attorneys, we were not acting as their counsel or as the counsel for the Town, and that our role in this matter was not to provide legal advice, but to conduct a factual investigation into complaints relating to the work environment. We informed witnesses that we were conducting an independent investigation and

¹ Eighteen complaints were provided by the Selectboard Members, which are identified more specifically herein. Multiple additional complaints were made or brought to our attention during the course of our investigation. However, our conclusions concerning those complaints, which were reviewed for their relevance to the claims we were tasked with investigating, are not included in this report.

advised each of them that although we could not require confidentiality, we encouraged them to refrain from discussing the matter to protect the integrity of the investigation.² Each witness interviewed agreed to speak with us voluntarily.

Methodology. Witnesses did not give their statements under oath. Nonetheless, all were told that it was important that they be honest and candid, and that the investigation would proceed under the good-faith expectation that witnesses were answering questions truthfully. This does not mean, however, that we unequivocally accepted all witness statements. We have drawn the conclusions in this Report from the totality of evidence, as we understood it, and a thorough analysis of the facts. Where necessary, we have made credibility determinations. When we have made a credibility determination, we have provided my rationale for the determination(s). At times, we considered and gave appropriate weight to information that might be considered hearsay in legal proceedings, and we have not excluded from my own consideration information and evidence that may be excluded in a court of law.

Standard Used. We applied the “preponderance of the evidence” standard in making factual conclusions. This standard means that we have based my conclusions on which factual scenario is “more likely than not” to have occurred. Quotations in this Report are not necessarily verbatim recitations of witnesses’ statements and are cited as accurately as possible from interview notes.

Witness Engagement. We conducted interview and/or engaged in email correspondence with the following individuals:

<i>Name of Interviewee</i>	<i>Engagement</i>	<i>Title</i>	<i>If applicable Date(s) of Interview</i>
Justin Makuc	Virtual interview	Selectman	December 22, 2020
John Weingold	Virtual interview	Selectman	December 22, 2020
Nancy Tomasovich	Virtual interview	Conservation Commission Member	December 21, 2020
Steve Weisz	Virtual interview	Selectman, Chair	January 5, 2021
Terry Walker	Virtual interview	Town Clerk	January 7, 2021
Melissa Noe	In-person interview at Offices of Greene & Hafer LLC	Town Administrator	January 10, 2021

² This admonition was ignored by Ms. Noe, the Town Administrator. Following her interview, we received an unsolicited email from John Coburn, who stated that he was communicating as a former Chair of the Board of Selectmen for Monterey. He informed us that he was debriefed following Noe’s interview and proceeded to offer his opinion as to what he perceived to be the purpose of the investigation.

Jeremy Rawitz	Virtual	Conservation Commission	January 11, 2021
Caleb Mitchell	Virtual	Former Conservation Commission Agent	January 19, 2021
Gary Shaw	Virtual	Assistant to the Town Clerk	January 19, 2021
Pauline Banducci	Virtual	Former Employee of Counsel on Aging	January 20, 2021
Chief Gareth Backhaus	Virtual	Police Chief	January 25, 2021
Jonathan Sylbert	Email correspondence	Finance Committee Member	
Don and Ellen Coburn	Unsolicited documents via postal mail	Former Select Board member and spouse	

We found the witnesses we interviewed to be generally forthright, and most were credible, but many appeared to have a specific agenda that he/she wanted to present regardless of the questions posed. This was taken into consideration when we made assessments of their credibility. Many of the witnesses wanted to know if their interview would be confidential since we were discussing information about their coworkers, to which we indicated that we could not guarantee confidentiality.

Applicable Policies.

The Town’s Employee Manual includes the following relevant policies:

At para. R to the subsection entitled “Employment Policies,” employees are admonished, “Any problems or misunderstandings that arise for an employee should be settled in an orderly manner,” but no procedure for resolution is spelled out. Employees “who feel the need for review or clarification of a particular personal situation” are instructed to “present their problem to their immediate supervisor” and “if they are not satisfied with a decision or are reluctant to address the issue with their supervisor, they may take their concern to the Select Board.” There is no indication of what the Select Board’s obligation is with regard to a complaint.

At para. W to the same subsection, there is paragraph entitled “Conflict of Interest,” which states, “As a public agency, it is very important the Town employees take extraordinary care to be sure that they do not take official actions that are, or may give the appearance of being, improperly influenced by personal gain or benefit.” It does not define a conflict, prohibit conflicts or mandate any remedial actions, except to state the accepting gifts in excess of \$50 has been determined violative of “State Ethics Law.” Employees concerned about a conflict are instructed to consult with their supervisor or the State Ethics Department.

At para. O, the subsection entitled “Conduct and Discipline” states,

all of our employees have a responsibility to the public, to the Town and to fellow employees to adhere to reasonable rules of behavior and conduct. In addition to maintaining appropriate standards of conduct, it is the responsibility of employees to fulfill the essential functions of their positions in an acceptable manner, both in quality and in the quantity of work produced. The Town reserves the right to take disciplinary action, as is necessary, to protect effective and efficient operations and the ability to provide high-quality service to the public. Any employee who is having difficulty meeting job standards should discuss the issue with their supervisor. In turn, it is the responsibility of the supervisor to counsel, support and assist all employees in helping them to meet job descriptions. The most egregious of improper behaviors, such as but not limited to, willful violation of safety rules, being intoxicated while at work, engaging in criminal conduct or acts of violence, theft of Town property, falsification of Town records or documents, and insubordination of your supervisor’s properly issued instructions may warrant immediate dismissal. Unsatisfactory or careless work, habitual absenteeism or tardiness and sleeping on the job are some examples of less egregious behavior that may result in disciplinary action, including dismissal.

At para. P, the subsection “Disciplinary Action” states,

Disciplinary action is intended to be corrective and remedial, allowing an employee the opportunity to correct a problem. The initial step will be a discussion between the supervisor and the employee with the hope that this will bring compliance with established work procedures. If there is inadequate improvement in behavior a written warning will be issued. This warning will include the reasons for the supervisor’s dissatisfaction and any supporting evidence and will be placed in the employee’s personnel file. Before any disciplinary action is taken, all pertinent facts will be carefully reviewed. The Town may impose unpaid suspensions of various time lengths in an effort to achieve compliance. If no remedial procedures succeed in restoring employee compliance dismissal is likely. The Select Board will provide an employee the opportunity to be heard concerning unacceptable behavior before the contemplated dismissal occurs.

Finally, the aforementioned Employment Policies section, at para. Q, prohibits harassment, including “verbal or physical conduct of a sexual nature that prevents an individual from effectively performing the duties of his/her position or creates an intimidating, hostile or offensive working environment,” and promises “a work environment that is comfortable and free from intimidation, hostility or other offenses that might interfere with work performance.” Despite the prohibition, the policy does not provide any remedy for addressing harassment, other than to direct complaints be made to the Select Board and Chief of Police, any penalty for harassers or procedures for making or investigating complaints, except to state, “Any action, which is verbally or physically intimidating, coercive or creates a hostile work environment, will

be viewed as harassment.” Further, para. O of the same subsection states, “All of our employees have a responsibility ... to adhere to reasonable rules of behavior and conduct.”

Appended to the Town Personnel Handbook is a Sexual Harassment policy. In relevant part, it states all employees of the Town “have the right to work in an environment free from sexual harassment” and it will “respond promptly to complaints of sexual harassment.” Personnel Handbook, Appendix B. Included among conduct prohibited by the policy are:

Making sexual comments or telling sexual jokes or stories; Transmitting or accessing sexually explicit materials by computerized or other means; Touching, pinching, groping, kissing or patting the body of another person; repeatedly asking a person for a date or to socialize outside of work after being informed such conduct is unwelcome; exerting pressure on another person for sex or a romantic relationship; or commenting on a person’s sex life.

The policy demands a prompt investigation, including a hearing by the member of the Select Board, one female and one male employee. It also promises, “No employee shall be retaliated or discriminated against in any way for making a complaint of sexual harassment for cooperating in the investigation of such a complaint.”

Monterey’s Town Bylaws, at Article VII, entitled “Personnel Policies,” only detail the holiday, sick and vacation policies, as well as time computation.

Employment Agreement

The Town Administrator (“TA”), Melissa Noe (“Noe”), is employed pursuant to an agreement with the Town executed February 24, 2021, for the term March 1, 2021, through February 28, 2024 (“Employment Agreement”). The Employment Agreement provides that Noe may only be terminated, if no cause exists, by a unanimous vote of the Select Board (“SB”) and with the payment of significant severance, but the Town, acting through the SB, may terminate her employment at any time for just cause. Although the contract states that just cause is defined as it is within the “Employment Manual,” there is no definition of just cause in that document.

The Employment Agreement includes an obligation to continue Noe’s salary if she does not have six months’ notice of termination.³ Her duties are delineated in an addendum, which is posted on the Town’s website. The job description does not include those of the Administrative Assistant and Clerk to the Board of Health but does state Noe maintains each of those positions (and is paid the attendant salaries). The Employment Agreement provides no limitation on duties that may be delegated to Noe by the SB and provides no mechanism for oversight by the SB, other than termination for cause (which is undefined). It contains a suspension provision, but only with full pay and benefits. It provides that her salary and benefits may not be reduced, but also states that if Town Meeting reduces the line-item compensation for the position, Noe can

³ “If less than six (6) months’ notice is given, Ms. Noe shall be compensated at her salary rate for said month or months within 30 days of the termination of this contract.” It is unclear whether it is referring to notice or termination or nonrenewal and whether it remains applicable if she is terminated for cause.

continue in the other positions she holds and that Noe and the SB “shall negotiate ... an annual salary raise subject to approval at town meeting.”

B. Summary of Allegation and Investigative Findings

(1) Terry Walker Complaint Against Noe and Shawn Tryon dated July 21, 2021

The Town Clerk, Terry Walker (“Walker”) made a timely report concerning an incident that occurred July 21, 2021, following a SB meeting. SB member Justin Makuc witnessed Noe and Highway Superintendent Shawn Tryon angrily confront Walker. Accounts of the altercation do not vary significantly, as set forth in the reports of both Chief Backhaus and Sergeant Fahey. The only dispute seems to concern the intensity of the argument and whether Walker could have reasonably feared for her safety. In that regard, we note that Walker was aware of a prior incident involving Tryon allegedly assaulting another employee. Therefore, whether this prior incident occurred as alleged or even if it did not occur at all, it informed Walker’s reaction.

We credit Makuc’s recollection of the events, given his status as the newest member of the SB at the time of the incident and his reaction. Acting in the moment, he judged the situation of such intensity that he needed to immediately check in on Walker and escort her to her vehicle. From there, however, Walker re-entered the building and sought the assistance of the Police Sargent immediately following the incident. He did not take her report at that time, but later described her as upset. Both the Chief and Sergeant made later reports of the incident, despite concluding that it was not a police matter. The Chief admits that he sought the advice of Town Counsel, who purportedly agreed with him that it was a personnel matter. The Chief’s categorization of this incident is curious in that he equates this incident with an earlier dispute between Noe and former SB member John Coburn, yet he contends that that incident should have been investigated.

The conduct of each of the employees involved in this incident may be considered violative of several sections of the Town’s Employee Manual cited above. At least one employee alleges an assault occurred, but the police declined to take action. As set forth at the conclusion of this report, the failure of the Town to promptly make any investigation as to the policy violations or to take any remedial personnel actions has likely contributed to the Town’s inability to move on from this incident.

(2) Jon Sylbert Against Noe dated August 17, 2021

Jon Sylbert is a member of the Finance Committee (“FinComm”) who alleges Noe acted inappropriately by intervening without justification and suggesting to the SB that Sylbert was not acting in his official capacity by requesting documents from the Monterey Fire Company. We have not investigated whether Sylbert was, in fact, acting within his authority, but rather

Sylbert's accusations that Noe's intervention was inappropriate, as that is the subject of the complaint we were assigned.

Pursuant to her Employment Agreement, Noe "shall act by and for the Selectmen in any legally permissible matter that they may assign to her relating to the administration of the affairs of the Town or of any Town office or department under their supervision and control." The By-Laws authorizing the Finance Committee does not reference the SB as its appointing authority. Our review of the many, many email exchanges between a number of individuals, which all preceded this complaint, leads us to conclude that there was a misunderstanding or dispute within FinComm (again, we do not offer an opinion on that) and that Noe took it upon herself to make the SB aware of it.

Given the wide scope of Noe's duties, including coordination between the SB and other entities, it is not necessarily inappropriate for Noe to have shared the information she had received from another FinComm member (including the suggestion that Sylbert was acting personally, whether or not it was accurate) with the SB. However, the Complaint is that Noe forwarded the material with the intent of "try[ing] to put [Sylbert] and [his] official and private activities under suspicion," and we find this allegation credible based upon a pattern of conduct whereby Noe, when any of her actions has been called into question (as Sylbert was questioning the financial reporting practices of the fire company for which she was responsible, at least in part), engages in potentially retaliatory behavior or takes action that may be perceived as efforts to shame or discredit her accuser. We found this pattern repeated, to greater or lesser extent, in the course of our investigation relative to Complaints (3),(5),(9),(10), (17) and (18). In some cases, Noe's actions may create liability for the Town, but probably not with regard to Sylbert's complaint.

(3) Pauline Banducci Complaint Against Noe dated August 18, 2021

Pauline Banducci's complaint against Noe arises from her work for a project run by the Council on Aging and funded by a state grant. Noe took ownership of the project and supervised its staff of volunteers. She told us that she assumed supervisory authority, second only to the project head, even though the workers were not employed by the Town, nor primarily working within Town Hall. Again, whether Noe overstepped her authority is difficult to determine given the broad scope of her duties. According to the Town's By-Laws, the Council is appointed by the SB and is to produce a yearly report to that body. The Town Administrator directly supervises "individual staff under the jurisdiction of the Select Board."

Ms. Banducci alleges that, while supervising the project, Noe was rudely dismissive of her concerns about protecting the confidentiality of information the Council was gathering. She also alleges that, on another occasion, Noe failed to intervene when Ms. Banducci was berated by another volunteer in her presence. Noe denies that she acted unprofessionally, but our investigation revealed that in early May 2021, Ms. Banducci contacted a SB member with some concerns about how the program was being managed. Noe was alerted to this contact and, in response, she wrote a May 26, 2021, email to Ms. Banducci, in which Noe complained that, in bringing her concerns to the SB member, Ms. Banducci had gone outside the chain of command.

In the same email, Noe made a counter allegation that she, herself, had received complaints about Ms. Banducci. The complaints were unspecified in the email and Ms. Banducci was unable to verify Noe's claim after talking to everyone with whom she had worked. Noe admits they were not serious in nature and cannot describe them with particularity. We find the tone of the email belittling and that the reference to complaints against Ms. Banducci was intended to intimidate her from further pursuing her concerns. Additionally, we find that, following this interaction, Ms. Banducci's payments on the project were unreasonably delayed and that Noe was the administrator in charge of said payments.

(4) Walker Complaint Against Tryon dated August 22, 2021

Walker claims that on this date, she was given an obscene gesture by Tryon. We did not investigate this claim because if it occurred as alleged, it amounts to a dispute between two co-workers, neither with authority over the other. Nonetheless, the Town as their employer had previously been notified of a negative interaction between these same two employees the prior month. Given the other findings, detailed herein (concerning harassment against Walker in the wake of her July complaint) it is reasonable to conclude that Walker is experiencing harassment in her workplace of which the Town is aware and therefore could be liable if remedial action is not taken. Our investigation revealed no efforts being undertaken by the Town to prevent harassment or retaliation.

(5) Nancy Tomasovich Complaint Against Noe dated August 29, 2021

Nancy Tomasovich is a member of the Conservation Commission ("ConComm") who made a record request to Noe, as the Town's records officer. Noe has an interest in the subject matter of the request because it concerned the Commission's former agent, on whose behalf Noe had previously intervened.⁴ Tomasovich alleges that the record request was first essentially denied. This claim is supported by email documentation. Tomasovich further alleges that when records were eventually provided by Noe, they were incomplete and not sent electronically, as directed by statute. Again, we credit the latter of these allegations.

Our investigation did not determine whether the production made in response to the request was sufficient under Massachusetts law, but rather the manner of Noe's response (i.e. not its substance). We find, within the emails produced, evidence that Noe, upon receiving the ConComm's complaint about its agent's job performance, intervened. Rather than forwarding it to the entire SB, Noe sent it to SB member Weisz alone, with a message requesting that he contact her to discuss. Setting aside the issue of whether Noe's role is so expansive that she has

⁴ Several interviewees to our investigation and documents submitted for our review made reference to Noe's role in the ConComm's attempts to discipline and to document the disciplinary record of its former agent. We did not make specific findings on this issue, but this is further evidence of the fundamental difference of opinion as to Noe's authority over town personnel, such as the agents, who are not paid by Town funds and who work for independent commissions, but whose appointments, payments and schedules are controlled by the Town, specifically the TA. Again, Noe's current job description does not offer resolution on this issue.

supervisory authority over the agents of independent commissions, we find it problematic that Noe would direct her correspondence to one board member to speak off the record. If Noe considered this a personnel issue between the Town and its employee, a possibility we cannot rule out, the topic should have been set for an executive session of the full SB.

(6) Walker Complaint Against Noe dated September 9, 2021/Corresponding Complaint of Noe Against Walker in Response dated September 13, 2021

Walker alleges false statements were made about the performance of her work by Noe during a September 1, 2021, SB meeting. Noe asserts the allegations she had made against Walker concerning an accounting error were correct. This complaint, along with many other similar “tit for tat” complaints were forwarded for our review. We find the underlying veracity of each allegation and counter immaterial, these complaints are only actionable to the extent that they shed light on the underlying issue of retaliation by Noe. Noe’s control over the agenda provides an avenue for her to raise alleged performance issues in a public forum in an attempt to disparage, whereas such issues should be addressed in the workplace between a supervisor and employee. Similarly, Noe has been subjected to public airing of grievances about her because the SB is the only forum for submitting such complaints. As previously recommended, a separate Human Resources staff member should be in place to manage workplace disputes, performance issues and oversee disciplinary action to ensure that it is appropriate, not retaliatory and proper discipline is consistently applied pursuant to policies, which are in need of revision.

(7) Justin Makuc First Complaint against Noe dated September 19, 2021

SB member Makuc complains that on September 19, 2021, he received an email from Noe in which she suggests that it is in the Town’s best interest for him to meet with Noe to discuss Walker and information Noe possesses about Walker. Noe proceeds to urge him and the SB to dismiss Walker’s Complaints concerning the July incident between the two of them (and Tryon). Makuc is informed that, in Noe’s opinion, indulging in an investigation is likely to expose the Town to additional claims by Walker. We find Noe has also personally urged Walker to drop her claims, both individually and in concert with Weisz.

Taken alone, the fact that Noe would reach out to a single member of the SB in an attempt to dissuade him from pursuing an investigation of claims made by any Town employee is troubling. We consider this complaint in tandem with other attempts to intimidate Walker or threaten her reputation and livelihood (taken by Noe alone or in tandem with others) and to retaliate against her for pursuing claims. As set forth above (with regard to the Makuc email) and below (in the context of other complaints), we find that Noe has undertaken several actions intended to retaliate, intimidate or otherwise coerce Walker. Moreover, based on the findings concerning our investigations of Sylbert and Banducci’s complaints, we find there is a pattern of behavior whereby Noe has taken action against employees or individuals whom, in her estimation, have undermined her authority or otherwise challenged her.

(8) Walker Complaint Against Noe dated September 22, 2021 (Incident After September Board Meeting)

Multiple witnesses support a finding that a disagreement occurred during the September 22, 2021, SB meeting, which then carried over into the hallways of Town Hall. Like the July incident, there is no meaningful dispute that the event occurred in generally the manner alleged. Noe admits that she yelled at Walker. Gary Shaw, former Assistant Town Clerk and assistant to Walker, witnessed the conduct at the meeting and after, describing Noe's behavior as belligerent toward both Walker and the SB members. We credit his description, given Noe's admission.

The only disagreement about these events is whether it escalated such that Noe's conduct could be considered threats of violence. Walker and Shaw claim Noe's behavior caused Walker to reasonably fear for her safety, on one hand, and Weisz and Noe contend that Walker could not have reasonably been in fear of violence. We find that if Weisz and Shaw were both compelled to intervene, Walker's fear was reasonable. As set forth at the conclusion of this report, we cannot offer an opinion as to whether Noe's behavior, which we find to have reasonably put Walker in fear, amounts to a terminable offense under her Employment Agreement. However, acts of violence is noted in the employee manual as one of the egregious behaviors that may warrant immediate dismissal. Where this was the second such incident admitted by Noe, we find disciplinary action was warranted, but no such disciplinary procedure exists under Noe's contract and the SB failed to follow the Disciplinary Action clause set forth in the Employee manual.

By the time this incident occurred, the SB was on notice of Walker's first complaint in which she made specific allegations, including fear of physical violence. We find that for Weisz to allow this second interaction to escalate as far as it did without more intervention or immediate disciplinary action is potentially problematic for the Town. Even were his inaction excusable, Weisz then orchestrated and participated in efforts to get Walker to retract her Complaint, as set forth below.

(9) Noe Complaint dated September 23, 2021

Noe filed a Complaint alleging SB member Weingold was creating a hostile work environment by failing to communicate with her and requesting that he only have conversations with her that can be recorded. Our investigation reveals that SB member Makuc is likewise unwilling to communicate freely with Noe. There is clearly a breakdown in the relationship between the SB, as chief executive body of the Town and its chief administrator. Noe makes additional allegations that she has been subjected to disparate treatment by the SB, who quickly approved adjusted work hours for Walker but did not act as quickly for her. She likewise complains that Makuc should not be able to initiate complaints against her while he is also investigating the claims of others.

There is no evidence that Noe's complaints stem from unfair treatment due to her membership in a protected class or, unlike Walker's complaints, that she has engaged in legally protected conduct to which these complaints could be related, nor that Weingold or other members of the

SB are engaging in retaliation. Regardless, any member of the SB, as an employer, should be willing and able to work cooperatively toward a productive and respectful work environment and the Employee Manual demands as much. We find that not doing so is a failure of leadership. Through the course of the investigation, we have received evidence that some of the most disturbing conduct has been undertaken by current or former SB members, directed at employees or each other.⁵

(10) Noe Complaint Against Walker dated September 24, 2021

Noe initiated a complaint against Walker for false statements and accusations made against her. They relate first to the parties' dispute regarding the MassWorks grant, but also to statements Walker has made about the subsequent incidents, including statements made in police reports. There is no new information to be investigated in this complaint, but rather Noe's denials or response to allegations previously made. This complaint is similar to those addressed above at Complaint (6).

⁵ The most egregious example is an email dated November 24, 2021 at 5:40AM from Don Coburn to Terry Walker, with the subject line, "Perhaps it's time to apologize and pray." The MCAD Complaint he references was obtained by Ms. Noe.

Terry,

Remember when I alerted you to the risks of precipitating an investigation? Well, now you are most likely about to face them.

However, before acting to bring your work history to the public's attention, I thought I'd give you one last chance to publicly apologize for all the complaints you've filed against Melissa, Shawn, Steve, Ellen and me, and to formally withdraw them permanently. Perhaps then the Select Board will allow you to continue to work until your planned retirement.

As you well know, and now I know, you've been playing the victimhood game in town after town, leaving a trail of anger, to put it mildly. I have your complaint filed with the Mass. Commission Against Discrimination and your signed withdrawal of it. You seem to want to forget you worked in CHESTER, but what's done cannot be undone.

In town after town, the writings, including your own letters of resignation, and newspapers, show you making the same complaints, using the same phrases, and then quitting or being "fired."

The full details of the PATTERNS of your behavior will now be made public. And any investigator hired by Monterey will be able to review your present claims in the light and context of your other claims in other towns.

I suggest that if you think a fully informed review of your work history will turn out well for you, you are seriously mistaken.

If you apologize and permanently withdraw your complaints BEFORE the end of TODAY'S SELECT BOARD MEETING, the information I have will be kept private. Otherwise, it will be used to inform all of the truth.

That Noe resorts to a formal complaint in order to offer her own counternarrative to Walker's complaints, is the best evidence of the Town's need for human resource services and, with regard to the dispute of these two employees, for the intervention of a professional mediator. As detailed below, both of these suggestions have previously been made to the Town and could have prevented or at least drastically curtailed the current state of events. The absence of such procedures (and a SB that has delegated its oversight obligations) can expose the Town to liability when employees such as Noe, in a supervisory position, take it upon themselves to "counterpunch."

(11) Walker Against Kevin Fitzpatrick dated October 4, 2021

Walker alleges she was subjected to sexually suggestive messages and unwanted touching by Kevin Fitzpatrick, who was then a co-worker. There is no allegation that the Town was aware of the conduct at the time it occurred. Fitzpatrick resigned after it was reported and before we were engaged. For these reasons, we do not offer an opinion as to whether it was violative or even actionable under the Town's sexual harassment policy.

We find, however, that it does not appear the Town harassment policy was followed in this instance, given the Chief of Police contends that his first notice of the allegation came from a State Police Detective, not internally, and given that he took no action. The policy demands a prompt investigation, including a hearing by the member of the Select Board, one female and one male employee. A prompt and appropriate response may have been managed if the Town had better reporting policies or had even followed existing policies. It is unclear whether the Town offered the hearing mandated and, to the contrary, we heard evidence that SB member Weisz suggested to Walker that she meet privately with him and Fitzpatrick (her alleged harasser) so that the latter could apologize. Moreover, we found no evidence that any effort has been made to further the policy's promise that "No employee shall be retaliated or discriminated against in any way for making a complaint of sexual harassment for cooperating in the investigation of such a complaint."

(12) Makuc Second Complaint against Noe dated October 7, 2021

Makuc alleges Noe has misrepresented meeting events in the minutes and fails to follow newly adopted procedures for adding initials to agenda items. We find that the examples he cited were each rectified. With regard to both the creation of agendas and the publication of minutes, there is a review process through which a member may review and approve the minutes and the Chair reviews and approves the agendas. Accordingly, we find that any failure or misrepresentation can be remedied. Further, to the extent that SB members disagree on agenda items, the Chair is in charge and it is a rotating position within the SB.

Our investigation revealed that, despite the existence of this review mechanism, both SB Members Makuc and Weingold, and Shaw have each complained of incorrect representations in the minutes, edits to minutes not being incorporated and/or missing agenda items. We recommend the position of Administrative Assistant be reinstated as a separate position from the

Town Administrator and preparation of meeting agendas and minutes be reassigned to be a part of that position's duties, such that the agendas and minutes are being compiled by someone who doesn't also advise the SB on policy or personnel matters.⁶

(13) Makuc Third Complaint against Noe dated October 16, 2021

Makuc's third and final complaint alleges Noe has engaged in intimidation and retaliation against Walker. We find that, by her own admission, Noe confronted Walker about her complaints in a hostile manner, as described above, during an incident on September 22, 2021. Noe also directed sweeping public record requests to Walker as the Town's records officer, which concerned Walker herself. The requests were made subsequent to Walker initiating complaints against Noe. We find the intent of each of these actions was to discourage, intimidate or otherwise dissuade Walker from pursuing her claims.

Our investigation also revealed that similar requests for information about Walker's employment history have been made by other individuals (who have aligned themselves with Noe) and that Noe, herself, shared with us a public records request she made, personally, to the Massachusetts Commission Against Discrimination asking for records related to Walker. The documentation she obtained was shared with us by her (and by others) in an effort to discredit Walker. This same information was the subject of threats (made by a former SB member) directly to Walker demanding that she stop pursuing her complaints or have this information (which he intended to be damaging to her reputation) exposed. See Note 6, above.

The actions she has taken, highlighted in this Makuc complaint, may be considered retaliatory if they amount to an adverse employment action against Walker. The most recent documents shared by Walker appear to show that her budget is being reviewed and that the SB is publicly considering what the impact of some of the information from her past should have on her current employment. Any adverse employment action which can be directly related to her complaints may expose the Town to liability.

(14) Walker Complaint Against Weisz dated October 16, 2021

Walker complains that she was coerced into apologizing for her role in the June incident and that SB Member Weisz has made several efforts to get her to withdraw her complaints against Noe, Tryon and Fitzpatrick. Our investigation revealed that Weisz admits to attempting to negotiate a sort of truce between Walker, Noe and Tryon in October, as well as evidence that Walker apologized for her role in the incident. A corresponding apology from Noe was reportedly conditioned on the retraction of Walker's complaint, by letter to be authored with Weisz. These

⁶ Similarly, record keeping duties should likewise be transferred from the Town Administrator position. Among Makuc's complaints is that Noe has withheld information he has requested, specifically with regard to the Council on Aging project. We find that while information was not ultimately withheld, Noe frustrated Makuc's efforts to obtain the information he wanted, manipulating his access to it by directing him to summary data. This is another example of the gatekeeper role Noe plays with regard to town resources. If Noe is advising the SB, she should not also be able to control members' access to documents.

actions were taken by Weisz before any independent investigation of the underlying dispute (which most witnesses identify as the MassWorks grant) was undertaken. Further, these requests for retraction came from two individuals in positions of authority over Walker. The Chief of Police confirmed that he was also asked by Weisz to intervene, but he did not (because he felt Tryon and Noe did not seem to him to be interested in resolution).

Like many of Noe's actions taken in response to Walker's complaints highlighted herein, the actions of Weisz may be considered the actions of the Town, as Walker's employer. While we credit Weisz's claim that he acted with the goal of achieving some level of harmony in Town hall, he failed to acknowledge that he was doing so while holding a position of supervisor to Walker. He also failed to acknowledge that his actions, attempting to influence Walker, were undertaken while she was also being barraged with additional coercive efforts (by Noe, by former SB members and others) that are well documented and must have been known to him.

(15) John Weingold Complaint Against Noe dated October 27, 2021

In his written complaint, Weingold alleges Noe has misused her power, leaked confidential information concerning complaints to the press⁷ and has given incorrect and/or misleading information to the SB. His primary complaint is rooted in a perceived lack of oversight by the Board over Noe, whom he views as having secured a lucrative contract that is detrimental to the Town. Most of our interview with Weingold focused on this topic, which we address in our recommendations below.

With regard to the specific allegations that Noe mislead the SB, we find they are supported by documentation. Via email, dated October 25, 2021, Walker reported recall votes certified to the SB. If this is the date of certification, and there is no contrary evidence (given that certification is Walker's duty), Noe's representation that votes had been certified on October 20, 2021, was inaccurate at the time it was made to the SB. Additional potential misconduct related to the recall vote has been referred to state election officials and, for this reason, we did not make additional findings on this issue.

Without reaching the question of whether Noe has engaged in any "misuse of power," as alleged, we acknowledge we made a number of findings potentially relevant to this issue. We found that Noe has purported to exert supervisory authority over individuals over which she has no clear claim of authority, including the various volunteers or agents who work for entities not funded by Town budgets. Likewise, two members of the SB provided credible evidence of instances in which they allege Noe manipulated agenda items for SB meetings or misrepresented meeting events in the minutes.

With regard to these findings, it is important to note that Noe is exercising authority that would otherwise be held by the SB. The SB Chair has the authority to set agendas, not the Town Administrator, though it may be delegated. Accordingly, if any manipulation is occurring, it is

⁷ We have insufficient facts to make any findings relative to the complaints related to leaks of confidential information by Noe. Although there are Town employees sharing information with members of the press, it is unclear that the Town has sufficient policies in place that would prohibit such actions.

with the Chair's cooperation or assent. Likewise, duties listed in Noe's job description are vast and all spring from the supervisory authority of the SB. We, therefore, conclude that "misuse of power" allegations may equally be labeled a relinquishment of powers by the SB. The Police Chief described this dynamic as the SB relying on Noe to "do their jobs."

(16) Makuc Fourth Complaint against Noe dated October 31, 2021

This complaint alleges conflicts of interest under Massachusetts law upon which we offer no legal opinion. As to the allegations, we find there is credibility to the accusations that Noe has sought the assistance of town counsel regarding the conduct of the SB's investigation of complaints against her and that she has exercised her powers as the Town Administrator to influence it. However, Noe's sweeping job duties, the SB's abdication of its oversight roles to her control and the fact that Noe maintained her role as Administrative Assistant after assuming the role of Town Administrator all contribute to the conflict about which Makuc complains. As the SB currently functions, Noe is empowered to influence scheduling and agendas. There is no policy or expectation concerning recusal.

(17) Jeremy Rawitz Complaint Against Noe dated November 8, 2021

The ConComm and Noe have an ongoing dispute based, in part, on Noe involving herself in ConComm's employment of its agent, who works at Town Hall, but is not a Town employee. We find that when the ConComm attempted to take an employment action against its agent, Noe intervened, denying the ConComm's request to seek guidance from Town Counsel⁸ and appearing at a disciplinary meeting between the ConComm Chair and its agent. Thereafter, Noe failed to timely and properly⁹ respond to the ConComm's public record requests (addressed in the subsection related to Complaint (5) above). We also find evidence suggesting that Noe initiated or abetted an attempt to remove ConComm member Tomasovich from her position.

Again, Noe's supervisory authority over ConComm agents is murky. Likewise, the authority delegated by the SB, as appointing authority, to Noe is sweeping. However, if Noe uses authority delegated to her to undertake actions that may constitute retaliation, a line is clearly crossed. We have found several instances in which Noe may have engaged in such conduct and she displays no awareness that such behavior may create liability for the Town (in fact she often describes her actions as protective of the Town). For example, when Noe made a written report of an argument had with ConComm agent Mitchell, she included in her report the allegation that Mitchell had hired Walker in the Town of Peru. It is obvious that Noe does this to imply an alliance between Mitchell and Walker (with whom she has an ongoing dispute), but the inclusion

⁸ Whether and when one is allowed to seek the guidance of Town Counsel is now governed by a recently adopted policy vesting authority in the SB Chair. We assume that prior to its adoption this past December, there was no clear direction on this issue.

⁹ We do not offer an opinion as to the sufficiency or accuracy of the record response, as it is beyond the scope of our investigation. As set forth below and for the purposes of this investigation, the finding that responses were delayed and the other steps taken by Noe, as related to the ConComm, were sufficient to provide our analysis concerning this particular complaint.

of this allegation, in and of itself, tends to show that Noe’s interaction with the ConComm and its agent is influenced by factors beyond her arguably legitimate supervisory duties.

(18) Melissa Noe Complaint dated November 11, 2021

We have insufficient facts to make any findings relative to the complaints related to leaks of confidential information. Although there are clearly Town employees sharing information with members of the press, it is unclear that the Town has sufficient policies in place that would prohibit such actions.

C. Conclusions

1. Scope

We found most witnesses credible, but each with a very clear agenda. Whether it was during interviews or with regard to providing documents, witnesses carefully curated the information they provided to support a position for or against the Town Administrator. Whereas we sought to limit our investigation to the factual allegations of the complaints brought to us, this tribalism expanded the scope of our investigation unreasonably. Nonetheless, we focus our analysis on two questions: (1) whether Town employees engaged in conduct violative of its employment policies, including whether Noe engaged in conduct that would provide a basis for her discipline or termination under her Employment Agreement and (2) whether any harassment or retaliation has occurred for which the Town may have potential liability.

While conducting our investigation, we were presented evidence of every conceivable grievance, dating back years. We contacted witnesses we considered germane to the investigation, but were also contacted by non-witnesses, with whom our contact information had been shared, and who sought to sway the investigation in one direction or another or who contacted us to suggest that it was improperly motivated.¹⁰ We have no opinion as to what motivated the SB to request this investigation. However, we have made assessments concerning the intent and individual motivations of Town employees and others we interviewed where it was relevant to credibility determination.

2. History

At least as far back as 2015, it has been recommended that the Town retain a Town Administrator. Most recently, in the 2020 Collins Center Report and the November 2020 report of Mark Webber (“Webber Report”), this recommendation was highlighted,¹¹ but neither report

¹⁰ One such email came from Don Coburn, who wrote (“as the former Chair”) to us immediately after meeting with Noe for the purpose of debriefing after her interview with us. His communication first carefully recounts his esteemed qualifications (totally unrelated to subject matter of our investigation) and then provides his opinion that he perceives the focus of our inquiry to be Noe’s promotion to Town Administrator and implies that the “main object” of the undertaking is to find a way to dismiss the Town Administrator.

¹¹ It must be noted that the Collins Center recommended, for reasons detailed in this report, a professional town administrator be hired externally, while the Weber Report concluded that Melissa Noe was well positioned to take on the roll with appropriate support.

touts this single measure (which was finally accomplished in April 2021) as the panacea for the Town's problems. Both Webber and the Collins Center offered their expert conclusion that the Town was in need of human resource services. In fact, the latter concluded, "HR management in Monterey could fairly be described as largely ad hoc and inconsistent. Responsibility is spread across multiple staff and the Select Board, or not clearly anyone's responsibility." The recommendations for the establishment of human resource services (as well as the suggestion by both experts that the Town make use of professional mediation services to resolve existing conflicts) have yet to be implemented and this investigation would likely have been unnecessary were they achieved.

The lack of trained human resource services was compounded by the Town's failure to fully implement the full complement of recommendations with regard to the hiring of a town administrator. As instructed by the Webber Report, it was not the title, so much as the job description, that was key to the successful implementation of his recommendation. Webber admonished, "[M]ost important would be to provide clarity as to the specific duties, responsibilities, oversight and authority of the position." Thus, he concluded, "A well-crafted job description, specific to the tenor and needs of Monterey, is crucial. Equally important would be to provide short term professional assistance to assist in the drafting of that documents and to guide its implementation." Despite this direction, the Town Administrator job description is sweeping, the Employment Agreement for the Town Administrator is a compilation of sample contract provisions handpicked by Noe herself and generally as if it is a compilation or draft, frustrating any effort to specifically determine the scope of the Town Administrator's authority, supervisory role or answerability to the SB. The list of duties is unconstrained, as is the authority it grants, with seemingly unlimited supervisory capacity.¹²

Determining the scope of the Town Administrator function is more complicated still by the fact that the current Town Administrator is fulfilling both her broadly defined role as chief administrator for the Town and her former role as Administrative Assistant. Thus, though Noe technically answers to the SB¹³, she does so with the protection of her Employment Agreement, with day-to-day control over SB's agenda, and while she is the de facto gatekeeper to any and all information SB members (and other citizens) may seek to access. As the Town has experienced this past year, the situation is untenable and completely contradicts the spirit of the expert recommendations, which envisioned a Town Administrator acting "as [the] town's chief

¹² Witnesses to the drafting process have led us to conclude that the broad scope resulted from a desire within the then-existing SB, or a faction therein, to create a town administrator position with undeniable supervisory authority over Noe, who (at the time the job description was initially drafted) was then the administrative assistant (and the alleged nexus of several disputes among town employees). When the position of Town Administrator was eventually awarded to Noe (over the objection of the same SB member who had sought to strengthen the authority of the Town Administrator position) and the job description was incorporated into her Employment Agreement, there appears to have been no effort to revise the description or in any manner account for the fact that Noe would be fulfilling the duties of both Town Administrator and Administrative Assistant (the duties of which do not specifically appear in her job description).

¹³ Even this fact, upon which all witnesses agreed, is not codified by the controlling Town Administrator Employment Agreement that merely reads, under the heading "Supervision Required," "The TA is appointed by the Select Board and functions under its jurisdiction and policy direction ...".

administrative officer as controlled by job description ... appointed by, answer[able] directly to and is employed at the pleasure of the Selectboard.” Webber Report.

3. Analysis under Existing Contract and Policies, with Recommendations

a. Whether Town employees engaged in conduct violative of its employment policies

Turning back to the operative questions of our investigation, conclusions are somewhat hampered, again, by the drafting of Noe’s Employment Agreement and the dearth of employment policies. Nonetheless, of the policies quoted herein, there can be no doubt that several were violated. Noe and Walker both admitted to behavior that would constitute violations of their duties to conduct themselves reasonably and without hostility, during their confrontations. While there is not specific remedy prescribed as far as discipline for their infraction, the policies call for such events to be reported to one’s supervisor. In this case, Noe arguably has supervisory authority over Walker, such that the only resort was to report her concerns to the SB. Walker took her complaints to the SB, but there are no disciplinary actions prescribed by policy, nor any individuals qualified to intervene in a neutral manner.¹⁴ Other employees whose actions likely violated existing policy are Shawn Tryon, for his role in the June incident, Mitchell, with regard to an altercation he had with Noe that was reported by her, and John Weingold, for his generally uncivil behavior, as reported by Walker. While the actions of these individuals may not rise to the level of disciplinary action (Mitchell was in the process of leaving his position at the time the incident occurred), it would be an omission not to call them out based on our findings.

It must also be noted that these are just a small sample of the many instances of discourteous (at best) behaviors that were reported to us in the course of our investigation. Most were too remote to be relevant to our inquiry, but the fact that they are so easily referenced begs the question what is the Town prepared to do about it? Beyond the obvious potential for liability, addressed below, there are other negative repercussions including an inability to attract or retain quality staff and volunteers. An issue of morale within the Town offices themselves has been reported to the Town by several expert reviewers, each of which has stressed the need for professional human resource services. Adopting these recommendations is the only way for the Town to slow turnover, resolve lingering disputes and prevent future issues. Additionally, an employee handbook that details specific procedures for the reporting, investigating and responding to employee disputes outside of the chain of command is imperative. These should include directives for handling disputes between members of the Town’s staff (including those under the direction of committees, counsels and boards) who are not necessarily employees. A specific chain of command, spelling out who is responsible for the oversight of individuals working for independent bodies that may or may not answer to the SB, will assist this process. Finally, we recommend leadership training for all SB members and commission or council chairs.

¹⁴ We acknowledge that current and former members of the SB made efforts to intervene, but for the reasons states herein, the circumstances in which these overtures were made rendered them problematic and lacking in neutrality.

- b. Whether Noe engaged in conduct that would provide a basis for her discipline or termination under her Employment Agreement.

According to her Employment Agreement Noe is appointed by the SB and “functions under its jurisdiction and policy direction,” but it does not specify the manner in which the SB is to supervise Noe. Presumably, because it contains provisions for termination and suspension, Noe can be disciplined for violations of policy, like other employees, but (as stated above) there are no specific procedures for doing so. Noe may only be terminated by a unanimous vote of the SB and with the payment of significant severance, unless just cause exists to do so. Despite the contract recitation that just cause is defined as it is within the “Employment Manual,” there is no definition of just cause in that document. The Town Bylaws, at Article VII entitled “Personnel Policies,” are limited and do not address cause, discipline or termination at all. Further, the Employment Agreement provides that Noe’s salary and benefits may not be reduced.

While several of the accusations against Noe are serious and, allegedly, continuing (such as deliberate alteration of SB minutes or agendas for her own interests) such that cause for her termination may, in fact, exist. The absence of a definition for what constitutes cause is sure to bring about litigation should the Town seek to terminate. Moreover, the inclusion of the strange provision stating “If less than six (6) months’ notice is given, Noe shall be compensated at her salary rate for said month or months within 30 days of the termination of this contract” makes it unclear whether the Town would owe this severance, even if she was terminated for cause, and, in any case, Noe will still be entitled to benefits upon termination regardless of cause. For these reasons, we do not recommend termination.

The most effective action the SB could take relative to Noe’s employment would be to better and more narrowly define the Town Administrator role in the manner originally recommended to the Town and to separate this role from the Administrative Assistant role. From there, a clearly written Select Board Code of Conduct that gives direction on SB interactions with other boards and committee members, Town staff, and the Town Administrator specifically, is likely to ease some of the tensions that have led to the myriad of reported incidents and prevent them from happening. Select Board Codes of Conduct are quite common and there are many that are publicly available to work from online.

- c. Whether any harassment or retaliation has occurred for which the Town may have potential liability.

Our investigation revealed a significant number of potentially actionable retaliation claims, some of which may be adjudged serious and ongoing. With regard to the investigated complaints detailed above, the actions of the SB and Noe are likely imputable to the Town and therefore may subject the Town to liability. Immediate action must be taken to address retaliatory conduct, including assuring employees who have initiated complaints that they have the right to be free from retaliation and providing a conduit through which any such conduct can be reported.

Much of the conduct, which could be perceived as retaliatory, has been occasioned by employees attempting to do their own investigation concerning claims. One such example is Noe’s

submission of an extensive, onerous public records request upon Walker. The Town needs to immediately implement procedures to independently address and provide redress to complainants. With regard to the pending complaints between current employees, we recommend professional mediation services, not informal mediation with current or former SB members who hold superior positions and without any requirement that complaints be withdrawn. In addition to adopting an SB Code of Conduct, the SB members should receive leadership training.

Sincerely,

A handwritten signature in cursive script that reads "Corinne Hood Greene".

Corinne Hood Greene