

Max B. Walton
TEL (302) 888-6297
FAX (302) 757-7299
EMAIL mwalton@connollygallagher.com
REPLY TO 267 East Main Street
Newark, DE 19711

September 20, 2017

By Electronic Mail

Fred Townsend, III, Esq.
Solicitor, Town of Dewey Beach
Wells Fargo Bank Building
18489 Coastal Highway, 2nd Floor
Rehoboth Beach, DE 19971

**Re: Independent Investigation of the Town Manager of the Town of
Dewey Beach**

Dear Mr. Townsend:

We write to provide our report (the “Report”) on allegations levied against Marc Appelbaum, the Town Manager for the Town of Dewey Beach (the “Town”), by current Town employees (the “Complainants”), in a June 14, 2017 Letter to the Mayor and Commissioners (the “Letter”).¹ As Town Solicitor, you engaged Connolly Gallagher LLP (“Connolly Gallagher”)² to investigate the allegations set forth in the Letter. In the course of our investigation, we also examined certain allegations set forth in a June 29, 2017 Verified Complaint (the “Complaint”) filed with the Delaware Public Integrity Commission (“PIC”),³ and certain other subsequent complaints received between June 27th and July 10th (the “Individual Complaints”). Our task is to confirm the veracity of the claims, and to make recommendations to the Town for action to address confirmed claims.

¹ Dewey Beach Police Chief Sam Mackert testified on September 7, 2017 that Alex Pires, owner of Highway One LLP, drafted the Letter, and that Mr. Pires may have received assistance from Diane Cooley. It is our understanding that Mr. Pires owns several eateries and bars in Dewey Beach, many of which have been the subject of various State and Town enforcement efforts, and his business entities are often at odds with the Town.

² The investigation was conducted by Max B. Walton, Esq.; Aaron Shapiro, Esq.; Kyle Evans Gay, Esq.; and Lauren P. DeLuca, Esq.

³ Herein, we do not provide a legal analysis of the claims in the PIC Complaint, although our factual findings may be relevant to many of the allegations set forth therein.

The findings set forth herein are based upon information provided to us by the Town, Mr. Appelbaum, the Complainants, the Individual Complainants, Town employees, the Commissioners, and the Mayor, in document form, and through interviews. Naturally, our findings are subject to change if additional information is presented. In compiling this report, we received a considerable amount of material and testimony, and the witnesses have raised or identified a significant number of claims, issues, and events. Given the inherent limitations of time and the intended scope for this investigation, we were unable to address all of the matters the witnesses identified. The claims in the Letter and PIC Complaint—and the additional issues identified during the investigation—cover a broad swath of activities, Town operations, and participants, over the course of years. However, our focus needed to stay on those claims that suggested potential illegal conduct or legal liability for the Town. We did not address or otherwise analyze to any great extent those claims that primarily relate to management style, discretionary fiscal management or budgeting decisions,⁴ or other interpersonal—but not actionable—disputes. Instead, the focus of this report is centered on the central themes of the June 14, 2017 Letter, namely: claims against Marc Appelbaum for sexual harassment, racial discrimination, creating a hostile work environment, and whether he may have otherwise violated the law or Town policies as a result of the actions complained of in the Letter and PIC Complaint.

The Report is divided into the following sections:

I.	Introduction, Background & Witnesses –	Page 3
II.	Scope of Investigation –	Page 7
III.	Summary of Investigation –	Page 8
IV.	Findings –	Page 15
V.	Recommendations –	Page 18
VI.	Authority –	Page 22
VII.	Analysis of Letter Allegations –	Page 35

⁴ In this Report, we reviewed claims that Mr. Appelbaum improperly moved funds in the Town’s approved budget, and the Town Manager’s authority to develop and manage the budget, as provided in the Town Charter. However, the investigators and authors of this Report are not auditors or forensic accountants, and were not hired to serve in this capacity. Our findings are based on the information provided to us, and an assessment of generalized claims made by lay people, who themselves are not auditors or accountants. We note that no recent third-party audit of the Town’s finances of which we are aware has revealed any fiscal improprieties to support the Claimants’ allegations against Mr. Appelbaum. However, the existence and review of information not presented to us, and analysis by a professional auditor, could yield different conclusions than we have reached in this investigation.

VIII. Analysis of PIC Complaint Allegations –	Page 102
IX. Analysis of Individual Complaints –	Page 105
X. Conclusion –	Page 112
Appendices	

I. INTRODUCTION & BACKGROUND

On June 14, 2017, the Letter addressed to the Town Commissioners and the Town Mayor was also provided to local media by certain employees or their representative(s). Through counsel, the signatories to the Letter later filed the Complaint with the PIC on June 29, 2017. The Complaint incorporated the Letter, asserted additional allegations of misconduct against Mr. Appelbaum, and included several statements from individual(s) who asserted certain claims of misconduct against Mr. Appelbaum in his capacity as Town Manager and related to his previous service (2012 or earlier) as a Town Commissioner or volunteer member of the Town’s Budget and Finance Committee.

In general, the allegations in the Letter and the Complaint assert that Mr. Appelbaum: (1) has engaged in repeated instances of sexual harassment against female Town employees; (2) has created a hostile work environment for all employees, but particularly female employees; (3) uses profanity and tells sexual stories and jokes, compounding the sexual harassment and hostile work environment; (4) bullies and denigrates Town employees in order to silence them and coerce their compliance with his directives; (5) insults and denigrates the Town Mayor and Commissioners as a demonstration of his lack of respect for the chain of command and the Commissioners’ authority; (6) has discriminated against minority employees based on their race; (7) has violated the Town Charter and Town Code through the mismanagement, misuse and/or the misappropriation of Town funds and the Town Budget; and, (8) has violated the Town Charter, Town Code and State law by improperly inserting himself into the management of the Town’s Police Department, Building Code enforcement, and the Dewey Beach Patrol (lifeguard operations).

Connolly Gallagher was contacted by the Town Solicitor’s office at the end of June to discuss conducting this investigation. A retention agreement was signed on July 3, 2017. Connolly Gallagher directed document preservation notices to the Town and to Mr. Appelbaum on July 10, 2017.⁵ The notices requested that

⁵ The document preservation notices are contained in an Appendix to this report, bates stamped REP 1-4.

recipients preserve all documents in their possession or under their control that could be relevant to the subject matter of the complaints and the investigation.⁶ Connolly Gallagher then invited the Complainants and other employees to sit voluntarily for interviews.

Four initial interview letters for individuals represented by Richard Cross, Esq., which included document requests, were sent on July 7, 2017.⁷ Soon thereafter, Mr. Cross prevented his clients from being interviewed, objecting to the process by which the Town Solicitor hired Connolly Gallagher to perform the investigation. On July 13, 2017, Mr. Cross also filed a complaint in the Court of Chancery alleging, *inter alia*, freedom of information act (“FOIA”) violations relating to Connolly Gallagher’s retention, seeking an injunction against Appelbaum’s alleged interference with the Police Department, the Dewey Beach Patrol, the Alderman’s Court and the Building Inspector, mandamus to remove the Town Manager, and recusal of the Town Solicitor. We conducted our first interviews of Town employees (non-Complainants) on July 19, 2017. Around this time, the investigation was delayed because of Mr. Cross’s unfounded claim that Max Walton, Esq. had a longstanding personal relationship with Mr. Appelbaum.⁸

⁶ During the course of the interviews, we received an allegation that Town Hall employees were shredding documents relevant to this investigation. We immediately informed the Town Solicitor, who, upon information and belief, immediately intervened. To be clear, under the preservation notice, no document relevant to this investigation should have been destroyed or shredded. At this stage, we have no ability to determine with certainty whether documents relevant to the investigation have been destroyed pursuant to our document preservation notice. It has been represented that no pertinent documents were destroyed, but we have no way to verify this assertion.

⁷ REP 5-12 contains samples of these letters.

⁸ Mr. Appelbaum testified to this allegation as follows during his interview:

Q: To the best of your recollection, how many times have we met?

A: To the best of my recollection, once.

Q: When was that, if you recall?

A: That would have been probably in late 2009, as I recall, in Glenn Mandel’s [sic] office, as I recall.

Q: And I assume that somewhere along the line we had a telephone conference call or something like that. Do you recall any conference calls that we had?

The Town Commissioners met to consider Mr. Cross's claims, and after due consideration, requested that Connolly Gallagher continue the investigation.

Not knowing whether the Complainants would agree to participate in the investigation, we pressed forward with interviews of consenting Town employees. Each employee received a letter detailing the time and location of their interview and requesting that they provide us any documents responsive to this investigation.⁹ Our firm also provided document requests to the Town and to Mr. Appelbaum.¹⁰ In addition, we directed document requests to those Complainants represented by Mr. Cross, requesting production of all responsive documents by August 4, 2017.¹¹ Lastly, we sent written requests for information to each of the Commissioners.¹² While responsive documents were received from the Town and Mr. Appelbaum by the August 4, 2017 date, no responsive documents were received from Mr. Cross's clients at that time. On Friday, August 11, 2017, Mr. Cross confirmed for the first time that he would make his clients available for interviews, and that his clients would participate in the investigation process.

We conducted a total of forty-three interviews beginning on July 19, 2017 and ending on September 8, 2017. Seven occurred in July and thirty-one occurred in August. In the two week timeframe between August 14 and August 24 alone, we conducted twenty-five interviews, with five additional conducted the following week. Our final five interviews were conducted between September 5 and September 8, 2017. Our request for documents from each Complainant was reiterated in their respective scheduling interview letters.¹³ Some documents were provided by Complainants at the time of their interviews, or after their interviews.¹⁴

A: I don't know.

Q: And beyond that, have we spoken since that time, since the law suits ended?

A: We have not.

⁹ A representative scheduling letter sent to each Town employee is provided at REP 9-12.

¹⁰ REP 13-33.

¹¹ REP 34-42.

¹² A sample is provided as REP 47-63.

¹³ A sample letter to the Complainants is provided at REP 43-46.

¹⁴ On September 7, 2017, at Chief Mackert's final interview, he revealed that he has "body camera" videos of several meetings with Mr. Appelbaum that were not previously disclosed or provided to the investigators. These videos should have been provided to the investigators, or at

The following is the list of witnesses¹⁵ who were interviewed:

Witness	Interview Date
Appelbaum, Marc (part 1)	8/15/2017
Appelbaum, Marc (part 2)	8/28/2017
Appelbaum, Marc (part 3)	9/8/2017
Campanile, Diane	8/22/2017
Cooke, Dale	8/23/2017
John Doe 1	7/31/2017
John Doe 2*	8/17/2017
Jane Doe 1 (part 1)	8/1/2017
Jane Doe 1 (part 2)	8/18/2017
Jane Doe 2	7/26/2017
Fritchman, Todd (part 1)*	8/17/2017
Fritchman, Todd (part 2)*	9/7/2017
John Doe 3	8/3/2017
Jane Doe 3	7/19/2017
Hanson, Diane	9/5/2017
Jane Doe 3*	8/29/2017
John Doe 4*	8/23/2017
Jane Doe 5	8/3/2017
Jane Doe 6	7/20/2017
John Doe 5*	8/14/2017
Jane Doe 7*	8/15/2017
Jane Doe 8*	8/24/2017

Witness	Interview Date
Jane Doe 13 (part 1)	7/25/2017
Jane Doe 13 (part 2)	8/1/2017
John Doe 6*	8/22/2017
John Doe 7*	8/14/2017
Mackert, Sam (part 1)*	8/18/2017
Mackert, Sam (part 2)*	8/24/2017
Mackert, Sam (part 3)*	8/31/2017
Mackert, Sam (part 4)*	9/7/2017
John Doe 8	8/4/2017
Jane Doe 9	7/27/2017
Mears, William*	8/16/2017
John Doe 9*	8/22/2017
Jane Doe 10 (part 1)	7/28/2017
Jane Doe 10 (part 2)	9/5/2017
John Doe 13	8/29/2017
Sweeney, Martha	8/16/2017
John Doe 10	8/7/2017
Jane Doe 11*	8/15/2017
Jane Doe 12*	8/31/2017
John Doe 11*	8/21/2017
John Doe 12*	8/21/2017

lease disclosed, on or before August 4, 2017. Nonetheless, we asked that the videos be turned over by the close of business on Friday, September 8, 2017. Despite our follow up telephone request to David Holmes, Esq. at 3:00 on September 8, 2017, these videos have not been received as of the date of this report.

¹⁵ Witnesses with a * designation are represented by Richard Cross, Esq.

II. SCOPE OF INVESTIGATION

This investigation was prompted by complaints from current Town employees against the Town Manager, Marc Appelbaum, as set forth in the Letter. Our engagement centered on the validity and/or severity of the employees' complaints against Mr. Appelbaum in his capacity as Town Manager. Thereafter, several other letters critical of Mr. Appelbaum were released to the press by Diane Jones, Martha Sweeney, Katrina White, Barbara Kyewski, Robert Belmonte, and Richard Solloway. In addition, the PIC Complaint was filed by the Complainants. Thus, although the scope of our initial investigation was expanded somewhat because of the additional claims, the PIC Complaint, and as the result of information received during interviews or the review of documentary evidence, the core focus of the investigation remained on employment-based complaints regarding Mr. Appelbaum's conduct.

Many of the allegations against Mr. Appelbaum relate to matters that occurred prior to his appointment as Town Manager. Due to significant attenuation, and because our investigation is focused on Mr. Appelbaum's interaction with employees as the Town Manager, we did not fully investigate those claims.¹⁶ In addition, because our investigation is focused on the appropriateness of Mr. Appelbaum's interactions with employees in his capacity as Town Manager,¹⁷ we did not interview most of the current commissioners, and we elected to not interview former commissioners Richard Solloway and Gary Mauler.¹⁸ Similarly, we did not interview Mr. Belmonte, who is not associated with the Town, and we did not grant interviews to Marcia Schick and Richard Hanewinckel, despite their requests. We did, however, interview Jane Doe 12 and Jane Doe 8, former employees who are mentioned in the Letter. We also

¹⁶ For example, one component of the PIC Complaint is an allegation of sexual harassment made by former Town Manager, Diana Smith, dating back to 2010 or 2011. We did not investigate this particular claim in significant detail because the Town had already reviewed Ms. Smith's claims and resolved those claims. *See* REP 125-126.

¹⁷ As the Commissioners are aware, we decided to not interview the sitting Commissioners; instead, they were requested to provide written responses to questions derived from the Letter and PIC Complaint. Mayor Cooke requested an opportunity to be interviewed, and we granted that request largely because he was mentioned by several witnesses as someone who was present at meetings or events that occurred in the current year. In an effort to clear up a factual discrepancy, we also conducted a short telephone interview with Commissioner Diane Hanson. We did not interview any other Commissioner or former Commissioner.

¹⁸ Mr. Mauler requested to be interviewed on several occasions. Although we allowed Mr. Mauler to submit a written statement, we chose to not interview him.

interviewed Martha Sweeney, based on the alignment of her claims with those made by certain current or former Town employees.¹⁹

III. SUMMARY OF INVESTIGATION

This investigation has been a difficult process because: (1) it has been conducted at a relatively breakneck speed;²⁰ (2) it has often been delayed and sidetracked by press disclosures and accusations occasioned by the Complainants;²¹ and (3) there is a paucity of documentary evidence to support many of the very public claims against Mr. Appelbaum. The interviews produced wide ranging, often conflicting testimony, and the contrast is striking. This dichotomy of witness experiences and perceptions necessitated difficult judgment calls: as often as one witness may have provided a compelling factual statement about a particular incident, or course of conduct, another witness may have made an equally compelling counter-factual statement. Even so, our role was to make these difficult factual determinations, and we have summarized them below.

For the most part, virtually all of the Town administration employees (non-Complainants) who were interviewed deny the vast majority of the claims in the Letter.²² These employees are predominantly female, and have varying lengths of service. They denied having personal knowledge of the conduct alleged in the Letter, and denied having heard any suggestion of, or comments about such conduct. This is significant given the relatively small number of Town employees, and their very close physical working proximity to each other. Many of these employees testified that Mr. Appelbaum is a great boss and an effective manager, and that the work atmosphere is fun and enjoyable—at least until the Letter was released. They enjoy their jobs and do not feel threatened or intimidated by Mr.

¹⁹ Many of the allegations relate to Mr. Appelbaum's clothing, attire, professionalism, and management style. While these allegations are addressed to some extent in this report, the primary focus of our investigation was to determine whether Mr. Appelbaum's actions constitute illegal or otherwise actionable conduct—with respect to the Town's employees.

²⁰ Completing this investigation in just over ten weeks, especially when the Complainants did not consent and appear for interviews until August 14, 2017, has been a daunting task.

²¹ The Commissioners are well aware of the multiple stories in the press regarding this investigation, and those stories will not be recounted herein. On one occasion, Mr. Cross went so far as to take a break from ongoing interviews with his clients to be interviewed by a local television station about the Town Manager investigation.

²² These current or former employees include, but are not limited to, Jane Doe 3, Jane Doe 10, Jane Doe 1, Jane Doe 9, Jane Doe 6, Jane Doe 13, Jane Doe 2, and John Doe 1.

Appelbaum, although they do note that some of his actions border on being unprofessional. However, they accept such behavior as a component of his personality and claim that they are not personally offended by his actions. One unifying theme is that these employees, or former employees, question the motivation of the persons making the accusations in the Letter, believing them to be unfounded.

In stark contrast, the Complainants tell a very different story about Mr. Appelbaum and his behavior, demeanor, and actions. These are primarily employees who are not under his direct supervision, and/or who have allegedly enjoyed relative autonomy and relatively little supervision under previous Town Managers. This includes the Chief of Police and the police force, the Dewey Beach Patrol Captain and the lifeguards, and the Building Inspector. These employees are resistant to Mr. Appelbaum's supervisory approach and practices, disagree with many of his managerial initiatives, do not agree with or attempt to comply with many of his expectations, and often object to his mannerisms, methods, and oversight.²³ Indeed, if Mr. Appelbaum feels that an employee is not doing his or her job correctly, or feels that better systems can be put in place, he will endeavor to question policies, make changes, and will otherwise demand explanations for why a practice is done in a certain way.²⁴ At bottom, and central to his management philosophy, Mr. Appelbaum is a demanding fiscal manager, endeavors to watch the Town's bottom line, and presses departments to run more efficiently. And, when there is a disagreement between Mr. Appelbaum and a department head over efficiency or cost, Mr. Appelbaum will aggressively question employees as a means to enforce his position or point. He routinely asks for proof and documentation, and he will even question the proof and documentation provided.

For his part, Mr. Appelbaum sometimes becomes confrontational with Department heads and employees who resist his guidance and supervision, which has caused friction. He can be cold, dogmatic, and forceful when facing disagreement with his beliefs or directions. He can be sarcastic when employees

²³ This group includes all persons signing the June 14, 2017 Letter, former employees Jane Doe 12 and Jane Doe 8, as well as Jane Doe 7 and Jane Doe 4.

²⁴ For purposes of this Report, the Town "departments" are the Police Department, the DBP, Building Code enforcement, Parking Code enforcement, and the Alderman Court.

do not see things “his way.”²⁵ The disdain with which many of the Complainants regard Mr. Appelbaum, juxtaposed with his sometimes demanding behavior, have literally driven a wedge between Mr. Appelbaum and Chief of Police Sam Mackert, DBP Captain Todd Fritchman, and the Building Inspector, Bill Mears. This disdain has caused some of the Complainants to inflate many claims and, at times, make misrepresentations in an effort to attack Mr. Appelbaum. The situation has escalated from a power and control struggle to what has turned into a spotlight atmosphere where every action, no matter how innocent, turns into conflict, fraught with emotion and paranoia.²⁶

As noted above, the Town employees who came forward as Complainants and those who otherwise presented themselves as witnesses to the investigation are divided into two camps: the Appelbaum supporters, and the Appelbaum detractors. His supporters appreciate his diligence and strong financial acumen and feel that he supports them in maintaining a work/life balance. The detractors despise his management practices, do not like him personally, and perceive him as being rude, overbearing, and unprofessional in many respects. Based on the often passionate descriptions the Complainants provided about how deeply they have been affected by these personality traits—not actions per se—we conclude that one of the motivations behind the Letter was to strike back at Mr. Appelbaum for these characteristics, as well as for many of his managerial decisions with which they disagree and resent.

We also conclude that the Letter was sent in retaliation for Mr. Appelbaum frequently inquiring into department operations and policies, scrutinizing their budgets and expenditures, and otherwise not allowing these departments to function with the high degree of autonomy to which they were accustomed. These efforts appear to be an unprecedented effort at departmental supervision: he steadfastly monitors their budgets, asks for more information than was the norm for previous Town Managers, and regularly questions policies and procedures.

²⁵ As an example, during a meeting with a police officer, the officer indicated that he did not have a direct policy on the conduct at issue. Mr. Appelbaum responded that no policy is necessary to say that you cannot “piss” or “shit” on a desk.

²⁶ An example includes, ironically, a draft PowerPoint presentation prepared for anti-harassment training. The draft presentation included a statement saying that harassment “ALWAYS involves Chief of Police misuse of authority to get sexual favors from an employee.” When the author the document—who is not a Town employee—was asked about this statement, she stated that the error was occasioned by an automated editing process, and was not included in the final presentation. Yet, this corrected, unintentional error prompted numerous accusations and meetings.

The Police Department

There is tremendous resentment and obstruction of any questioning by the Town Manager into the policies and actions of the Police Department. Examples include, but are not limited to:

- The Town engaged the Lyons consulting group to review its personnel policies and employee files. Chief Mackert opposed the review of police department personnel files. However, the consultant, Diane Campanile, was able to review those files and concluded that they were not being maintained properly. Chief Mackert then contacted the department's consulting attorney (John Brady) to meet with Ms. Campanile regarding her findings. When Mr. Brady agreed with Ms. Campanile, Chief Mackert advised Town employees that Mr. Brady "threw him under the bus," indicating that Chief Mackert opposed the technical review of the police department employee files by the HR consultant.
- For an unknown period of time, the police department has received, stored, and sold federal surplus equipment. At least some of the received equipment has / is being stored at an employee's farm, and at local auto body shop.²⁷ After the equipment has been retained for one or two years, it is sold, and the proceeds are retained by the police department. To the limited extent the investigation was able to examine this matter, it appears that the transactions have been completely separate from the Town's administration, have not been included in the Town's books and records, and have not been subject to audit. Sale proceeds are not distributed to the Town, and the money is used at the department's exclusive discretion, at least on some occasions for the purchase of police equipment and vehicles. Mr. Appelbaum recently learned of this program when the police

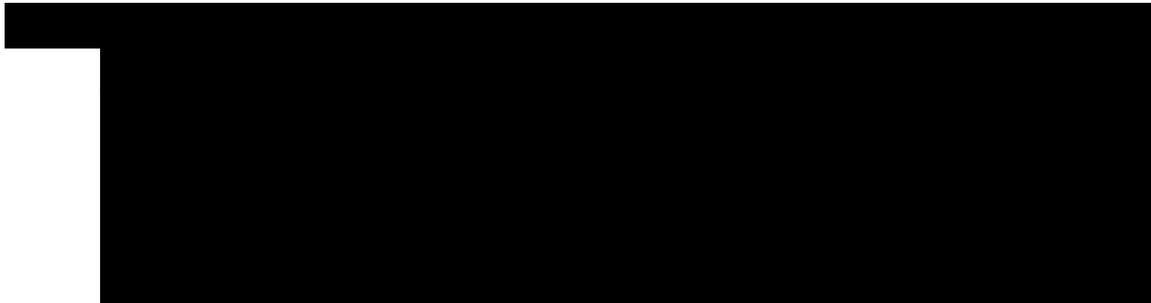
²⁷ While there may be a reviewed and approved procedure for obtaining, transporting, storing, insuring, and selling the equipment and then accounting for the proceeds and subsequent expenditures by the Police Department, this information has not been provided. We did not specifically request such information because it is beyond the scope of our investigation of the allegations made against the Town Manager. However, we are concerned that this practice may not satisfy required disclosure and accounting standards and needs to be reviewed immediately. Equipment obtained through the program should be titled in the Town's name when acquired, storage and use should be approved, the sale of equipment should be approved, and proceeds should be accounted for.

department purchased two new police cars for just under \$100,000. Upon information and belief, inquiry into the scope and the propriety of these “off-book” funds by Mr. Appelbaum has been halted as a result of the Letter and Complaint, and this investigation.²⁸

- As the Town Commissioners are aware, earlier this year, a gun was stolen from a police officer’s unlocked police car. At Mr. Appelbaum’s request, an outside law enforcement procedure expert, Dr. Gregory Warren, was hired to review the relevant departmental policies and to review the incident as a whole.²⁹ When Chief Mackert was advised, he “looked like he was going to be sick” and he did not believe a consultant was needed or required. Soon thereafter, the Letter was sent, and we understand that Dr. Warren’s policy review has been put on hold.³⁰

The Dewey Beach Patrol

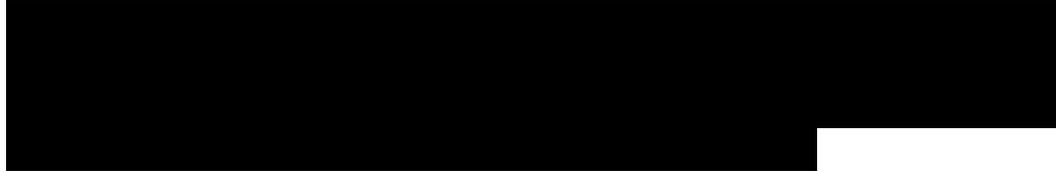
DBP leadership resents and objects to suggested policy and practice changes or questioning by Mr. Appelbaum of DBP policies. Examples include but are not limited to:



²⁸ Chief Mackert testified that he believes this was the first time surplus property has been sold. The Chief’s recollection was contradicted by John Doe 2 who stated, “[i]n the past, it would go into our police fund . . . ,” indicating there were previous sales of surplus property. John Doe 4 testified that “the Town of Dewey Beach hasn’t bought a police vehicle with town funds in 10, 10 years maybe, maybe more than that” due, in part, to the sale of surplus equipment, which he called a “slush fund” used to “pay the bills on equipping the police cars.”

²⁹ We believe that Mr. Appelbaum acted prudently to involve himself with the investigation of this highly sensitive matter.

³⁰ Outside consultant reviews of the Police Department have been proposed by the Town Manager in the past. We are advised that the Police Department has refused to engage in these reviews and has lobbied the Commissioners to avoid such review of its policies and practices.



- During the process leading up to the adoption of the FY 2018 budget, Mr. Fritchman and Mr. Appelbaum purportedly reached an understanding that two lifeguards would patrol the beaches between 11:00 p.m. and 2:00 a.m., and those lifeguards would receive double pay for their shifts. Mr. Fritchman believes this extra shift is unnecessary (because the beach closes at 1:00 a.m.),³¹ and claimed that he could not find lifeguards to fill the shifts.
- During the budget development process, Mr. Appelbaum suggested an alternate staffing model for the lifeguards which, in his view, would have put more lifeguards on the beach for less money. It is clear that Mr. Fritchman resisted and resented any proposed change in his staffing model because, in his view, any change would violate policies contained in the lifeguard handbook that he wrote. In the end, Mr. Appelbaum did not mandate and Mr. Fritchman did not follow the alternate staffing model.

The Building Inspector

Similarly, Mr. Mears has strong objections to Mr. Appelbaum's inquiries into matters Mr. Mears views as his exclusive responsibility and prerogative. Overall, Mr. Appelbaum generally only becomes involved with building code and permit enforcement when he receives complaints about Mr. Mears's actions or performance. And Mr. Appelbaum has received many complaints about Mr. Mears's attitude and job performance, as well as complaints regarding his code interpretations. Mr. Mears plainly stated that he joined the Letter because Mr. Appelbaum had sought to change his job description and/or had inquired whether he wanted to retire.³²

³¹ "The other thing I brought to the Town Manager's attention is the beach is officially closed at 1:00 a.m. It's town law. The beach is closed, so we didn't feel there was a need to go past that time. . . ."

³² Q: Why was this complaint brought now?

A: Because it's -- The question you asked me about that new job description and stuff, personally, I have to work and I need to work. I can't afford to retire. And like I

We have concluded that Chief Mackert, Mr. Fritchman, and Mr. Mears are the catalysts for the Letter and Complaint, and all three intensely dislike Mr. Appelbaum. They represent the Town's "old guard" and have become accustomed to working under Town Managers who (apparently and allegedly) provided little to no supervision over their respective operations. All three have objected to Mr. Appelbaum's inquiries and proposed changes with frequent disregard for the reasons or rationale behind the inquiries and proposals. They have made very public complaints that are, in our view, retributive and in retaliation for Mr. Appelbaum's involvement in areas they believe to be their exclusive province. They have also embellished alleged facts because they dislike Mr. Appelbaum and his probing, stern, and sometimes overbearing management style.

We do not believe that the Letter was written at the behest of those employees who claim they were subject to racially discriminatory or sexually harassing conduct, exemplified by the fact that two of the most serious incidents cited by the Complainants occurred in 2012 or 2013, four to five years before the Letter was delivered to the Town. We also have concluded that many of the claims asserted in the Letter are inflated, or are otherwise without merit, and are very likely occasioned by the Complainants' resentment of Mr. Appelbaum's perceived "interference" with their areas of responsibility. We did not find any evidence to conclude that Mr. Appelbaum has engaged in a continuing course of sex discrimination or harassment against any individual employee or in general; nor could we conclude that he generally discriminated against employees based on their race. We also do not find that any of Mr. Appelbaum's efforts to control expenses and investigate departmental operations and practices jeopardized public safety. To the contrary, these efforts appear to be generally rational and pragmatic.

said, when that abruptly came to me this time last year about retirement, I thought to myself and I told him: I don't want to retire. I can't afford to retire, and I don't want to retire. And now he brought this up this year. It started building up. And I'll tell you, I had open heart surgery six years ago. And since this has -- The past year has been almost unbearable there with all the different things that have been going on with him, with me. And last August, when he abruptly brought this to my attention, he constantly reminded me: You know, I was put in this position to fire you. And if you read some of the stuff that dates back years ago in there, that was his intention years ago, to have me fired, even when he wasn't a commissioner -- I mean wasn't a Town Manager. . . .

(Mr. Mears goes on to state that the former Mayor and Appelbaum have a personal vendetta against him).

Despite what we conclude to have been reasonable managerial and policy initiatives—and a beneficial focus on fiscal discipline and accountability—there is little doubt that Mr. Appelbaum has subjected several of the Complainants to some “rough and tumble” treatment. This appears to be as much a result of his personality and managerial style, as it is his focus on performance metrics and results. Because prior Town Managers do not appear to have used a similar hands-on, detail oriented and results driven approach, or exercised the same level of scrutiny and supervision, in combination with his personality and mannerisms, the result is discord and resentment.

In summary, the Complainants have very publicly alleged some credible, but mostly uncorroborated and not credible complaints against Mr. Appelbaum. We conclude that this is partly in retaliation for how he performs his job as Town Manager. Key Town departments have operational flaws or inefficiencies that Mr. Appelbaum has tried to correct, with varying degrees of success in relation to the amount of cooperation with, or resistance, to his efforts. One factor that virtually all of the Complainants and other witnesses agree upon is that Mr. Appelbaum has brought a high degree of fiscal rigor to the Town’s operations. Conversely, his abrasiveness and sometimes crude or insensitive language, a sometimes casual approach to attire, and his tendency to scrutinize policy choices and business decisions have put him at odds with the Complainants.

However, our conclusion that the Letter appears to be motivated to a significant degree by protectionist and retaliatory impulses must not be construed as meaning that all of the claims are without foundation. And we do not intend to suggest in any way that the Town should excuse those allegations of inappropriate conduct that we have been able to corroborate. As described in the following sections, we have concluded that Mr. Appelbaum more likely than not engaged in inappropriate conduct on occasions, for which timely intervention and corrective action would have been warranted. We have also concluded that he likely exceeded his authority in certain operational areas. Based on these findings, we have recommended that the Town consider taking specific action to address these matters.

IV. FINDINGS

After reviewing all of the testimony and documentary evidence, we find that it is more probable than not that Mr. Appelbaum engaged in the following behavior that we believe is inappropriate, unacceptable, contrary to an applicable standard,

or is otherwise improper conduct for an official of his level of responsibility and authority:

1. Although denied by Mr. Appelbaum, on one occasion in 2012 or 2013, he rubbed his bare foot on the leg of a female employee, Jane Doe 11. Chief Mackert witnessed this incident. Letter Paragraph #3.
2. Although denied by Mr. Appelbaum, we conclude that he used the phrase “the brown people” in a discriminatory and demeaning manner, on one or more occasions in 2012 or 2013, as alleged by former employee Jane Doe 12. This claim was corroborated by current employee Jane Doe 10.³³ Letter Paragraph #18.
3. Although denied by Mr. Appelbaum, by the slimiest of margins, we find that Mr. Appelbaum, at minimum, created an uncomfortable environment during a meeting with Ms. Sweeney in March 2016. The

³³ Though Jane Doe 10 corroborated Jane Doe 12’s claims, her testimony is somewhat vague. She states:

A: Her name was Jane Doe 12. She was an African American girl, and I know she was not happy with it, but I don’t know as far as obscenities. There was one conversation, and he laughed and whatever and referred, you know, to brown people, you know what I mean, but I don’t know.

Q: Did you?

A: But she was never really happy with the job.

Q: Did you hear Mr. Appelbaum say “brown people”?

A: Yes. I think I did, uh-huh.

Q: Do you remember when that was or what the context of that was?

A: No. It’s been so long because she’s been gone for, oh, my, I’m trying to think. She’s been replaced by a male and then, you know, that was the job that Jane Doe 6 now has. I mean, she was just an assistant. She didn’t have the title of Town Clerk, this Jane Doe 12.

Q: Okay. In any other context, have you ever heard Mr. Appelbaum use the term “brown people”?

A: No. That was the only time that, you know, that I heard that.

statements of the participants, however, are conflicting, and there were no witnesses to the alleged incident. Although we cannot conclude that this incident may have been legally actionable sexual harassment, it could be viewed as inappropriate conduct, particularly by the Town's top administrative official.

4. In July of 2017, Mr. Appelbaum recounted a story to male and female Town employees about a woman adjusting her "tits" or "breasts" prior to entering the Alderman's Court, which included his physically demonstrating aspects of the story. This incident was contemporaneously reported by one employee. Mr. Appelbaum admitted to telling the story but denies that it was improper, or that he intended to insult or denigrate anyone. We note that no female employee reported this incident and that the one female employee who was identified as witnessing the story cannot recall the incident.
5. We believe it is more likely than not that while serving as the Town Manager, Mr. Appelbaum has on occasion acted in a demeaning manner towards employees.

These incidents, particularly those in our first and second findings above, should have been reported and dealt with in a timely manner; however, they occurred four to five years ago. If timely reported, the Town should have taken the matters seriously, and responded with appropriate corrective action. But, there is a critical challenge that the Town should analyze and address: there does not appear to be a formal or commonly understood internal mechanism in the Personnel Policy Manual, the Town Charter, or the Town Code for employees to file and pursue complaints—particularly against the Town Manager. Despite the infirmities in the Letter and among the Complainants, and despite their motivations, this lack of a defined complaint procedure could be one reason why the Complainants filed the Letter with the Town Commissioners and, frankly, politicized the process. For this reason, we recommend, as described below, that the Town implement a confidential system to receive, respond to, and resolve employee complaints, including taking corrective action when appropriate.

We also find it is more than likely that Mr. Appelbaum has engaged in other behavior that should be addressed:

6. He may have overstepped his authority regarding the supervision and administration of the Alderman Court Clerk position.

7. At times, he does not wear shoes in the office.
8. At times, Mr. Appelbaum wears sweatpants or pajama pants in the office.³⁴
9. Mr. Appelbaum admittedly uses the terms “fuck” and “fucking” in the presence of Town employees and Town Commissioners and has “given the finger” on some occasions.

V. RECOMMENDATIONS

In specific instances (notably Findings #1 and #2 above), Mr. Appelbaum’s conduct has been severe enough to warrant a corrective response by the Town Commissioners. As detailed in Section VI (Authority), conduct need only be unwanted, and may need to only occur once to constitute actionable harassment.³⁵ And, the confirmed conduct would appear to violate the Town’s existing anti-harassment / workplace conduct policy. Had these matters been duly reported to Town officials in a timely manner, prudence would have dictated that they take immediate action to stop and remedy the conduct. With respect to the use of the phrase, “the brown people,” and related conduct, an investigating agency might have determined that Mr. Appelbaum created a hostile work environment based on discrimination, which caused an actionable impact on working conditions.³⁶ Without delineating every possible cause of action under federal and state law, the Town could have faced legal claims alleging harassment, a hostile work environment, and discrimination based on race or sex.³⁷

³⁴ We note that Mr. Appelbaum lives next door to the current Town Hall location and will often go to Town Hall early in the morning to set up his work for the day. However, even though it may be a matter of convenience, the Town Manager should endeavor to establish an appropriate tone in the workplace that is not achieved by overly casual attire.

³⁵ See *Faragher v. City of Roca Raton*, 524 U.S. 775, 788 (1998) (“isolated incidents” if “extremely serious” may amount to severe or pervasive conduct); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (sexual harassment so severe or pervasive as to alter the conditions of employment creates a hostile work environment).

³⁶ Cf. *Castleberry v. STI Grp.*, 863 F.3d 259, 265 (3d Cir. 2017) (finding single use of a racially charged slur in front of African-American and White employees accompanied by threats of termination constituted severe conduct that could create a hostile work environment). For a discussion of damages available under the employment discrimination statutes, see Section VI.C.1, *infra*.

³⁷ A more detailed factual analysis of the allegations concerning the leg-rubbing incident (Letter Allegation #3), and the use of the phrase “the brown people” (Letter Allegation #18), is

Generally, due to the age of some of the claims, the limited and unrepeated nature of the more severe claims of actionable harassment and discrimination, the lack of contemporaneous documentation, the lack of recorded contemporaneous complaints for the most serious allegations, the lack of corroborating evidence, the context and overly politicized manner in which the complaints were brought vis-à-vis the June 14th Letter and subsequent actions, and the apparent motivations for many of the complaints that were uncovered during the investigation, we cannot recommend that the Commissioners pursue the removal of Mr. Appelbaum, since such action would probably fail the required “just cause” standard for imposing removal.³⁸ The Commissioners, however, should not turn a blind eye to his conduct, which could have resulted in liability to the Town, and which warrants corrective action—without regard to potential legal liability.

There are other important considerations. While the Town does have an existing Personnel Policy Manual,³⁹ which contains important policies for acceptable workplace conduct and accountability, there is no functioning Town policy for disciplining the Town Manager outside of the Town Charter (Sections 15 and 16), or other specific guidelines that govern such action. The result is that the Complainants could have concluded that there is no effective complaint or grievance process for issues related to the Town Manager and were therefore left with no practical measure other than submitting their detailed list of complaints to the Town Commissioners and Mayor as their only means of seeking redress. We recommend that this situation be reviewed and remedied.

Due to the exceptional circumstances presented in this investigation, we expect that the Commissioners may be required to exercise their authority and discretion in a novel fashion. Notably, our investigation has clarified that, despite instances of misconduct, Mr. Appelbaum has started several policy initiatives that should be beneficial to the Town’s administration and its employees. And, he has

included in Section VII. Testimony provided by the Complainants and other witnesses corroborated these claims.

³⁸ See Section VI.B, *infra*. We believe that “just cause” in this context will be defined to mean “a legally sufficient reason” for any action the Town elects to take. See *Vann v. Town of Cheswold*, 945 A.2d 1118, 1121 (Del. 2008).

³⁹ Ironically, it is Mr. Appelbaum that has been pushing to revise the Personnel Policy Manual, and is the key Town official that has been seeking to develop more updated human resource standards and policies for the Town.

brought a commendable level of fiscal rigor to the Town's operations. Additionally, as noted throughout this investigation, the Town should have legitimate concerns about some of the internal policies and actions of the Police Department, the DBP, and potentially also with building code interpretation and permitting approvals. Initiatives to improve these Town operations should not be derailed due to Mr. Appelbaum's unrelated, albeit unacceptable conduct.

Based on the forgoing, we recommend that the Commissioners of the Town of Dewey Beach take the following actions:

1. Formally reprimand Mr. Appelbaum for the incident where he placed his bare foot on Jane Doe 11's leg.
2. Formally reprimand Mr. Appelbaum for his use of the phrase, "the brown people" in at least on one or more conversations with Jane Doe 12.

The Commissioners can consider taking more comprehensive corrective action for the incidents in Recommendations #1 and #2. These are instances of serious conduct. However, they appear to have been isolated and unrepeatable, indicating that an immediate separation from the workplace, for example, may not be necessary to currently preserve employee safety and maintain a safe working environment. And, when the attenuation of time is considered, assessing a proportionate response poses a challenge. Also, since the Town has not defined "just cause" with respect to its Town Manager position, or confirmed that its anti-harassment / workplace conduct policy applies to the Town Manager (*see* Section VI.C), our recommendation is that the Commissioners should work with counsel to determine what type of disciplinary action is appropriate and supportable, if a reprimand is deemed insufficient. At the very least, Mr. Appelbaum must be put on notice that his conduct was unacceptable, is not to be repeated under any circumstance, and that any further such conduct will result in disciplinary action, potentially up to and including dismissal.

3. Within 60 days of the date of this report, Mr. Appelbaum should be required to complete the following types of training: anti-harassment, anti-discrimination, effective interpersonal communications (including non-defensive communications), and effective methods of supervision).
4. The Town should expedite the efforts currently underway to update its human resource policies and the Personnel Policy Manual, including

clarifying disciplinary standards and grievance procedures applicable to all Dewey Beach personnel. The Manual should have clear standards that establish enforceable non-discrimination and anti-harassment policies. Once completed, the updated policies / Manual should be distributed to all employees, and the Town should conduct mandatory training sessions for the new policies.

5. In the absence of a distinct human resources director position, the Commissioners should consider immediately establishing a human resource ombudsman, or similar position, to act as a confidential contact for Town employees to report any conduct they believe is improper, such as sexual harassment, race or sex discrimination, workplace violence, policy violations, or other conduct by employees and supervisors they believe is inappropriate and perhaps unlawful. This ombudsman should have the authority to bring reported incidents to the appropriate supervisor and the Town Manager but should also have the ability to bring concerns to the Town Solicitor or the Mayor for action in the event that they involve the actions of the Town Manager, or if the Town Manager or supervisor, in the opinion of the ombudsman, fail to investigate the complaints or fail to take necessary or appropriate action regarding the conduct.
6. The Commissioners should immediately require that all employees working on an hourly basis be required to use a time clock or similar verifiable timekeeping method for FLSA non-exempt employees.
7. The Commissioners should immediately require that the Police Department be reviewed to assure that its policies, especially its policies relating to the handling and storage of duty weapons and the proper use of assigned vehicles are appropriate and are followed. We recommend that the Town move expeditiously to fully engage the outside law enforcement consultant that it has preliminarily contracted with for a full review of the Police Department.
8. The Commissioners should immediately require that the Police Department provide all records relating to its involvement with the federal surplus equipment program, including a full accounting of all equipment received by the department, all proceeds from the sale of that equipment, and how those funds have been expended. The review should include a determination that the program, as currently operated, is compliant with applicable law and accounting

requirements. In conducting this review, the Town should assure that all equipment owned by the Town or its agencies (the Police Department, DBP, the maintenance division, or other departments) is properly insured and is accurately accounted for on the Town's records.

9. The Commissioners should require an immediate review of the parking ticket appeals system and should assure that all parking ticket appeals are appropriately handled.
10. Although the Clerk of the Alderman's Court is technically an employee of the Town, the Town Commissioners should consider taking steps to delineate the Clerk's responsibilities and reporting structure.

VI. AUTHORITY

A. Powers and Duties of the Town Manager

1. Town Charter

Sections 15 and 16 of the Town Charter govern the Town Manager and his responsibilities. Section 15(a) provides that the Town Manager is appointed by the Mayor and a majority of the Commissioners to be the "Chief Administrative Officer" of the Town as well as the "Secretary of the Commission" and the "Treasurer" of the Town.

The Town Manager's duties, responsibilities, and powers are broad. The Town Manager is "responsible to the Commissioners of the Town of Dewey Beach for the proper administration of the affairs of the Town . . ." ⁴⁰ He has the sole discretion and power over appointing and hiring employees and their compensation. ⁴¹ In addition, the Town Manager "shall be the sole judge of the competence or incompetence" of any employee he hires or appoints. ⁴² The Commissioners "shall sit as a Board of Appeal" for employees when a majority of the Commissioners agree that "a review of the action of the Town Manager would be in the best interest" of the Town. ⁴³

⁴⁰ Town of Dewey Beach Charter ("Charter"), Section 16(a).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

The Town Manager’s duties include, among others: supervising the administration of the affairs of the Town; preparing and submitting the annual budget estimate to the Commission; supervising the sewer, water, streets, parks, and “other administrative affairs of the Town and all work relating thereto”; administering the Town Charter and the resolutions and ordinances of the Commission; administering “all provisions of this Charter and ordinances and resolutions of the Commission relating to the affairs of the Town when not otherwise provided for by this Charter or by any ordinance or resolution of the Commission”; and, collecting taxes and fees and making an account of monies received and disbursements made.⁴⁴

2. Employment Agreement

Mr. Appelbaum’s Employment Agreement (the “Agreement”) provides that he shall have the duties and responsibilities as enumerated in the Town Charter and Town Code – and those duties assigned by the Commissioners. In addition, it provides that, “[i]n cooperation with the Town Commissioners, [Mr. Appelbaum] will have lead responsibility for the development and day to day operations of the Town’s budget.”⁴⁵

B. Town Manager Accountability – Just Cause

The Town Charter and Mr. Appelbaum’s Agreement provide that he may be removed only for “just cause.” Both sources are silent on final “disciplinary” action other than removal. “Just cause” is not defined in the Town Charter, the Town Code, or the Agreement. The Town’s current Personnel Policy Manual for the Town of Dewey Beach (the “Manual”) includes a non-exhaustive list of actions for which employees may be dismissed for “cause,” but it is unclear whether the Manual governs the Town Manager. These standards, however, are the most indicative of how the Town might define and apply “just cause” as a substantive standard, in this case. Alternatively, a court will usually look to an applicable statute or common law to determine what “cause” means, and whether the standard has been met.

⁴⁴ Charter Section 16(b), (c), (f), (g).

⁴⁵ A copy of Mr. Appelbaum’s current employment agreement is provided at REP 117-19.

1. Town Charter

Under the Town’s Charter, the Town Manager “may be removed for just cause” by a majority vote of the Commissioners.⁴⁶ The Charter provides for pre-determination due process: in the event the Commissioners wish to remove the Town Manager, the Commissioners shall adopt a preliminary resolution at least 30 days before his termination is to become effective stating the reasons for his removal.⁴⁷ In this preliminary resolution, the Town Manager may be suspended from his duties with pay.⁴⁸ The Town Manager has the right to reply in writing and to request a public hearing, which shall be held within 20 to 30 days of its request.⁴⁹ After the public hearing, the Commission needs a majority vote to adopt a final resolution of removal.⁵⁰

2. Employment Agreement

Mr. Appelbaum’s current Agreement is for a two-year term: March 12, 2016 – March 11, 2018. The Agreement provides that his employment may be terminated before the term has expired “only for just cause” and “only by majority vote of the Commissioners.” The Agreement further references Section 15(c) of the Charter, which as discussed above, provides certain procedural rights.

3. Personnel Policy Manual⁵¹

While it is unclear whether the policy standards in the Manual apply to the Town Manager—who is the designated authority for enforcing many of its provisions—the Manual does provide a definition of “cause” that may provide guidance for interpreting the “just cause” standard that applies to the Town Manager position. Section 6-1 of the Manual provides that an employee’s “[d]ismissal is the removal of an employee from Town employment for cause.”⁵² This Section also provides that “any employee may be dismissed for the inability

⁴⁶ Charter Section 15(c).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ There is some question whether the current Manual was ever formally approved, and we understand that the Manual is rarely consulted.

⁵² Section 6-1 B(h).

to perform required work or for misconduct, negligence, inefficiency, insubordination, repeated unauthorized absence, or the commission of other offenses. . . .”⁵³ The following actions and circumstances are included in the Manual as examples of “cause”:

- Conviction of a felony or any criminal offense involving moral turpitude;
- Intoxication or under the influence of drugs while on duty;
- Wanton carelessness or gross negligence in the performance of duties;
- Wanton offensive behavior or the brutal treatment of fellow employees or other persons;
- Violation of law, ordinance, or regulation;
- Any other conduct when given the nature of the offense, other personnel action, in the opinion of the Town Manager, would be inappropriate.

As a source for the definition of “cause,” the Manual provides examples of conduct that constitute “cause” *per se*, as well as more generalized types of conduct that could constitute “cause” (e.g., violation of law, ordinance, or regulation). Despite the question of whether the definition(s) of cause in the Manual apply to the Town Manager, they do provide a relevant, if not a reasonable basis to at least suggest, if not define, “just cause” with respect to the Town Manager position.

4. Just Cause under the Common Law

Delaware law is unsettled on the definition of “cause.” “Cause” (sometimes used interchangeably with “just cause”) has many varied definitions across different statutory contexts.⁵⁴ For example, in the unemployment insurance compensation context, “just cause” has a very specific definition: “a wilful or wanton act in violation of either the employer’s interest, or of the employee’s

⁵³ *Id.*

⁵⁴ The Delaware Supreme Court has noted that “just cause” has many different meanings throughout Delaware law, including in the “employment context, in the unemployment compensation context, and in a plethora of other sections.” *Vann v. Town of Cheswold*, 945 A.2d 1118, 1121 (Del. 2008) (sustaining the dismissal of the Town’s Chief of Police).

duties, or of the employee's expected standards of conduct. A 'wanton' act encompasses recklessness, whereas a 'wilful' act includes an intentional element."⁵⁵ This is a somewhat high standard to meet, as it includes an element of intentional or reckless failure to follow an employer's policies.

Other authorities indicate that, where "cause" is not defined by agreement, an employer has "cause" to terminate if "the employee has materially breached the agreement, including by persistent neglect of duties; by engaging in misconduct or other malfeasance, including gross negligence . . ."⁵⁶ This is a "default rule that governs when the parties have not defined in their agreement their own understanding of what constitutes cause."⁵⁷

In Delaware, in the absence of a specific definition of "just cause," public sector employees are allowed a degree of latitude to determine what constitutes "just cause" for employee accountability. In *Vann v. Town of Cheswold*, the Delaware Supreme Court concluded that a "more traditional notion of 'just cause'" is appropriate in the employment of civil servants, which was interpreted to mean "a legally sufficient reason."⁵⁸ This is a relatively "open" standard, and preserves a significant amount of substantive discretion to an employer. A public employer is therefore able to consider whether a wide range of conduct and employee performance constitutes cause, without necessarily having to codify a substantive definition prior to application. However, since public sector employees are entitled to certain substantive and procedural due process rights, government employees must avoid arbitrary and unreasonable responses to employee conduct. In this case, the Town has an important degree of authority to determine that the standards set forth in the Manual do (or do not) apply to the Town Manager, or to look to other standards for defining "just cause."

⁵⁵ *Short v. Mountaire Farms & Unemployment Ins. Appeal Bd.*, 2013 WL 5492576, at *2 (Del. Super. Ct. Sept. 25, 2013) (internal quotations omitted).

⁵⁶ RESTATEMENT OF EMPLOYMENT LAW § 2.04. The Restatement of Employment Law, while not a law itself, may provide a source for answering the question of what "cause" means. Delaware courts often look to Restatements where Delaware law is unclear or not yet settled.

⁵⁷ *Id.* cmt. a.

⁵⁸ *Vann*, 945 A.2d at 1122 (stating that "in the employment context and particularly here in the employment of police chiefs, the more traditional notion of 'just cause' is appropriate. Black's Eighth Edition defines 'just cause' and 'good cause' as 'a legally sufficient reason'").

C. Legal Standards Implicated by the Complainant’s Allegations

The allegations at issue implicate standards of conduct under federal and state law, and Town policies prohibiting discrimination on the basis of race and sex, sexual harassment (including hostile work environment), and other acts claimed to violate the Town Code, or state and federal law.

1. Discrimination on the Basis of Sex and Race

Under both federal⁵⁹ and state law⁶⁰ employers may not discriminate against employees with respect to compensation, or other terms, conditions, and privileges of employment on the basis of their race, color, religion, sex, or national origin.⁶¹ The DDEA is nearly identical to the federal Title VII employment discrimination statute in this regard; therefore, “the Delaware Supreme Court has held that the tests and standards used for Title VII apply to Delaware statutory claims as well.”⁶²

The damages available to Title VII litigants, should an employer be found liable of intentional discrimination, include compensatory damages, back pay, front pay, nominal damages, costs, and attorney’s fees. Examples of compensatory damages are pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life as a result of the unlawful employment action – they are separate from “back” and “front” pay, which are the amount of wages that the claimant would have earned, either in the past or in the future if he or she had continued to be employed. For employers with between 14 and 101 employees in each of 20 or more calendar weeks, compensatory damages awards are capped at \$50,000.⁶³

⁵⁹ Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e-2, *et seq.*

⁶⁰ The Delaware Discrimination in Employment Act (“DDEA”), 19 *Del. C.* §§ 700 *et seq.*

⁶¹ 42 U.S.C. §§ 2000e-2(a); 19 *Del. C.* § 711(a).

⁶² *See Paitsel v. State*, 2016 WL 1424828, at *5 (Del. Super. Ct. Apr. 7, 2016). It should be noted that the DDEA protects a broader class of individuals than its federal counterpart, but those classes were not implicated by the allegations here.

⁶³ 42 U.S.C. § 1981a(b)(3)(A). However, Title VII compensatory damage caps do not limit recovery under state anti-discrimination statutes. *See Gagliardo v. Connaught Labs*, 311 F.3d 565, 571 (3d Cir. 2002) (adopting reasoning of the Ninth Circuit that Title VII caps “do[] not prevent a claimant from recovering greater damages under a state law claim that is virtually identical to a capped federal claim”).

Punitive damages are available under Title VII, but not against a political subdivision such as the Town.⁶⁴

Title VII claimants must exhaust their administrative remedies before pursuing an action in Court – this includes filing a charge of discrimination with an appropriate enforcement agency—either the United States Equal Employment Opportunity Commission, or the Delaware Department of Labor—within required timelines. Both the DDEA and Title VII impose a 300-day statute of limitations period within which a claimant must file a charge of discrimination.⁶⁵

Public employers may also be subjected to civil rights claims brought under Section 1981 for race discrimination⁶⁶ and Section 1983 for employment discrimination.⁶⁷ To be clear, Section 1981 provides a right, not a remedy – it is enforceable under a Section 1983 claim.⁶⁸ But it is worth noting that, in contrast to Title VII claims, there is no administrative remedy exhaustion requirement⁶⁹ and

⁶⁴ 42 U.S.C. § 1981a(a)(1); *see Blackshear v. City of Wilmington*, 15 F. Supp. 2d 417, 430 (D. Del. 1998) (finding city, as a municipal corporation, was a government subdivision not subject to statutory punitive damages provision under Title VII).

⁶⁵ 42 U.S.C. § 2000e-5(e)(1); 19 *Del. C.* § 712(c).

⁶⁶ 42 U.S.C. § 1981 is a federal civil rights law prohibiting race discrimination in the making and enforcing of contracts. The protections afforded by Section 1981 may in many cases overlap with those of Title VII.

⁶⁷ 42 U.S.C. § 1983 is a federal civil rights law that provides a remedy to people (typically private citizens) who have been deprived of their federal constitutional or statutory rights by a person acting under color of state law. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also, e.g., Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995) (“A prima facie case under § 1983 requires a plaintiff to demonstrate: (1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law.”). A section 1983 employment discrimination claim may be similar in many respects to a Title VII claim, but unlike Title VII which applies to both private and public employers, Section 1983 applies only to defendants who acted under color of state law.

⁶⁸ *Daoud v. City of Wilmington*, 894 F. Supp. 2d 544, 556 (D. Del. 2012). In addition, “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.” *Id.* at 557 (quoting *Monell v. Dep’t of Social Services*, 436 U.S. 658 (1978)). Instead, the alleged unconstitutional action must be from the implementation of an ordinance, regulation, official policy, adopted decision, etc. that is “promulgated by the [government’s] officers.” *Id.* Based on the claims we have investigated, we cannot conclude that the Complainants have effectively articulated a claim of “official” government action vis-à-vis their claims about Mr. Appelbaum’s conduct.

⁶⁹ *See, e.g., Roebuck v. Drexel Univ.*, 852 F.2d 715, 739 n.44 (3d Cir. 1988) (discussing interplay between § 1981 and Title VII judgments) (citing *Cheyney State College Faculty v.*

thus the statute of limitations is longer – two years in Delaware.⁷⁰ In addition, punitive damages may be available under Section 1981 and Section 1983, and there are no caps on compensatory or punitive damages.

2. Harassment – Sexual Harassment and Hostile Work Environment

The scope of Title VII’s prohibition is not limited to “economic” or “tangible” discrimination; harassment that is so “severe or pervasive” as to alter the conditions of the victim’s employment is covered by the statute.⁷¹

i. Federal and Delaware Law

Courts have used two different frameworks to analyze sexual harassment claims: *quid pro quo* and “hostile work environment.”

The *quid pro quo* theory involves a tangible employment action resulting from a refusal to submit to a supervisor’s sexual demands.⁷² A plaintiff may prove a claim of *quid pro quo* sexual harassment by showing her response to unwelcome advances was subsequently used as a basis for a decision about compensation, terms, conditions, or privileges of employment.⁷³

A plaintiff claiming harassment under a hostile work environment theory must show:

- (1) [. . .] intentional discrimination because of their [protected status, such as sex or race];
- (2) the discrimination was severe or pervasive and regular;

Hufstедler, 703 F.2d 732, 737 (3d Cir.1983); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 761–63 (3d Cir.1971)).

⁷⁰ See *Daoud*, 894 F. Supp. 2d at 557 (“Section 1983 does not itself provide a statute of limitations; rather, the applicable statute of limitations is the state’s statute of limitations governing personal injury claims. See *Wilson v. Garcia*, 471 U.S. 261, 276–78, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Samerіc Corp. v. City of Philadelphia*, 142 F.3d 582, 599 (3d Cir.1998). In Delaware, the statute of limitations for a personal injury cause of action is two years. 10 Del. C. § 8119.”).

⁷¹ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

⁷² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998).

⁷³ *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281–82 (3d Cir. 2000).

- (3) the discrimination detrimentally affected the plaintiff;
- (4) the discrimination would detrimentally affect a reasonable person of the same sex or race in that position; and
- (5) the existence of *respondeat superior* liability.⁷⁴

The law requires, not just rude behavior, but a level of “discriminatory intimidation, ridicule, [and/or] insult that is sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”⁷⁵ When reviewing a claim for harassment, the court will not consider each act in a vacuum; rather, it will view the offending party’s actions in the aggregate.⁷⁶ Courts consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁷⁷ The conduct at issue “must be extreme to amount to a change in the terms and conditions of employment . . .”⁷⁸ The courts set a standard for judging hostility that is “sufficiently demanding” to ensure that the laws against sexual harassment are not confused with a “general civility code.”⁷⁹

If an alleged harasser is a so-called “equal opportunity offender,” that is, he harasses both men *and* women, then it will be more difficult to prove that the harassment is motivated by a protected characteristic. For instance, in *Connell v. Nicholson*, the Court found that the facts failed to support a hostile work environment claim based on gender because “both male and female . . . employees were exposed to [the harasser’s] ire and so, to the extent her bad behavior can be characterized as a ‘disadvantageous term or condition of employment’ for workers

⁷⁴ *Brooks v. CBS Radio, Inc.*, 342 Fed. App’x 771, 775 (3d Cir. 2009) (harassment based on race); *Huston v. Procter & Gamble Paper Products Corp.*, 568 F.3d 100, 104 (3d Cir. 2009) (harassment based on sex); *Davis v. Nat’l R.R. Passenger Corp.*, 733 F. Supp. 2d 474, 487-88 (D. Del. 2010) (harassment based on race).

⁷⁵ *Peace-Wickham v. Walls*, 409 F. App’x 512, 519 (3d Cir. 2010) (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (internal quotations omitted)).

⁷⁶ *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999); *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 715 (3d Cir. 1997).

⁷⁷ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

⁷⁸ *Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005) (internal quotations and citations omitted).

⁷⁹ *Faragher v. City of Roca Raton*, 524 U.S. 775 at 788 (1998) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)).

who had to deal with it, it was a gender-neutral condition.”⁸⁰ In addition, “[a] supervisor could show favoritism that, although unfair and unprofessional, would not necessarily instill the workplace with oppressive sexual accentuation. The boss could treat everyone but his or her paramour badly and all of the subordinates, save the paramour, might be affected the same way.”⁸¹ This conduct has not been found to create a claim of sexual harassment.⁸²

1. Employer Liability

An employer cannot fairly be blamed for sexual harassment or a hostile work environment unless the alleged victims or others make the supervisor aware of the alleged harassment. In fact, the United States Supreme Court has established an affirmative defense that completely absolves an employer of liability where an employee unreasonably fails to bring a matter to the attention of someone in a supervisory capacity. Specifically, the Court has held that an employer may not be held liable for a hostile work environment if “the employer exercised reasonable care to prevent and correct promptly any. . . harassing behavior,” for example, by providing training and ways to file complaints up the line, but the “employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁸³ The victim has an affirmative duty “to use such means as are reasonable under the circumstances to avoid or minimize the damages” caused by the alleged hostile work environment.⁸⁴ “If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.”⁸⁵

If an employee does report harassment, the employer can be held liable if it fails to take remedial action reasonably calculated to prevent further harassment.⁸⁶ Thus, the employer is expected to investigate the harassment – but the law does not require investigations to be perfect. “Even if a company’s investigation into

⁸⁰ 318 F. App’x 75, 77–78 (3d Cir. 2009).

⁸¹ *Mondero v. Lewes Surgical & Med. Assocs., P.A.*, 2014 WL 6968847, at *3-4 (D. Del. Dec. 9, 2014) (citing *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990)

⁸² *Id.*

⁸³ *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 765.

⁸⁴ *Faragher*, 524 U.S. at 806-07 (quoting *Ford Motor Co v. E.E.O.C.*, 458 U.S. 219, 231 n.15 (1982).

⁸⁵ *Id.*

⁸⁶ *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997).

complaints of sexual harassment is lacking, the employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is also lacking.”⁸⁷

ii. Town and State Codes of Conduct

The Town Code contains a Code of Conduct applicable to all appointed officials and Town employees.⁸⁸ The standards of conduct set forth in the Code prohibit an “officer or employee, in the course of his/her public responsibilities,” from using “the granting of sexual favors as a condition, either explicit or implicit, for any individual’s favorable treatment by the Town.”⁸⁹

The Code incorporates the Delaware State Code of Conduct.⁹⁰ The State Code provides, similarly: “No state employee, state officer or honorary state official, in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual’s favorable treatment by that person or a state agency.”⁹¹

While the Town’s Code of Conduct *may* provide relevant standards in this matter, it is unclear to what extent it does apply since the Town does not appear to have taken the steps necessary to supersede the State’s Code of Conduct for public officials, with the Town’s Code. Nevertheless, the Town’s Code of Conduct provides, at the least, informative guidance.

iii. Town Sexual Harassment Policy⁹²

The Town has purportedly adopted a policy prohibiting sexual harassment as set forth in its Manual (no other form of harassment is expressly prohibited by the policy).⁹³ Section 4-12 of the Manual provides:

⁸⁷ *Id.*

⁸⁸ Town of Dewey Beach Code, Chapter 10, § 10-1.

⁸⁹ *Id.* § 10-3 D.

⁹⁰ *Id.* § 10-8 (Code not intended to supersede State of Delaware Code of Conduct).

⁹¹ 29 *Del. C.* § 5806(h).

⁹² Section 1.A of the Manual provides that its provisions apply to “all employees on the Town payroll.” That includes Mr. Appelbaum.

Sexual harassment is a form of employee misconduct which undermines the integrity of the employment relationship. Each employee of The Town of Dewey Beach, regardless of sex, is entitled to a working environment which is free from intimidation and sexual harassment. The Town shall not tolerate any form of sexual harassment by any employee of either sex.

The Manual defines sexual harassment as “behavior that is not welcome, that is personally offensive, that fails to respect the rights of others, that debilitates morale and that, therefore, interferes with the work effectiveness of its victims and their coworkers.”⁹⁴ The following conduct is prohibited under the policy:

- 1) Making an unwelcome sexual advances, a request for sexual favors, or other verbal or physical conduct of a sexual nature a condition of employment for any applicant or employee;
- 2) Making the submission to or the rejection of such conduct the basis for an employment decision affecting an applicant or employee; and
- 3) Creating an intimidating, hostile, or offensive working environment by such conduct.⁹⁵

The Manual further prohibits: sexual innuendos; suggestive comments; jokes of a sexual nature; sexual propositions; threats; sexually suggestive objects or pictures; graphic comments; suggestive or insulting sounds; leering; whistling; obscene gestures; unwanted physical contact such as touching, pinching, or brushing the body; coerced sexual intercourse; assault.

An employee who feels he or she has been sexually harassed and who wants the act investigated has a grievance procedure under the Manual, which begins with submitting a written report of the alleged act “immediately” to his or her supervisor and to the Town Manager.⁹⁶ If the supervisor or the Town Manager is

⁹³ A copy of the sexual harassment policy contained in the Manual is provided at REP 121-22.

⁹⁴ Manual Section 4-12 B.

⁹⁵ *Id.* Section 4-12 B (1)-(3)

⁹⁶ *Id.* Section 4-12 C.

involved, then the report of harassment must go to “the next higher level of supervision,” here, the Commissioners.⁹⁷

The Town Manger or a designated representative then investigates all alleged violations of the policy.⁹⁸ Each employee is “guaranteed the right to a fair and [im]partial hearing.”⁹⁹ An employee who is found to have violated the policy “shall be subject to appropriate disciplinary action up to and including termination of employment.”¹⁰⁰ Such disciplinary action depends on the “severity of the incident.”¹⁰¹

In addition to the sexual harassment policy, Section 4-3 “General Employee Work Practices” provides:

Each employee is expected to obey and comply with all Town, State and Federal ordinances, laws and statutes, as well as all written and verbal Town and Department policies, procedures and work rules.

Further,

An employee who violates any of the above work practices shall be subject to disciplinary action up to and including dismissal. Disciplinary action shall depend on the severity of the incident.¹⁰²

D. Miscellaneous Conduct Standards

1. Town Code of Conduct

Prohibited conduct in the Code of Conduct appears to be implicated in the allegations, such as:

⁹⁷ *Id.* Section 4-12 C(1).

⁹⁸ *Id.* Section 4-12 C(2).

⁹⁹ *Id.*

¹⁰⁰ *Id.* Section 4-12 D.

¹⁰¹ *Id.*

¹⁰² Manual Section 4-3 B.

- No official or employee shall use his position to secure special privileges or exemptions for himself or herself or others whether for compensation or gratuity.¹⁰³
- No official or employee shall create or cause unwarranted interference with police officials or with civil regulatory investigations or criminal investigations.¹⁰⁴

2. Personnel Policy

Section 4-6 of the Manual, titled “Motor Vehicle Accidents” states:

If an employee of the Town is involved in an accident while operating a Town vehicle which is the result of negligence on the part of the employee, then he or she shall be subject to disciplinary action up to and including dismissal. Disciplinary action shall depend upon the severity of the incident.

VII. ANALYSIS OF LETTER ALLEGATIONS

The June 14th Letter was addressed to Mayor Dale Cook, Commissioner Courtney Reardon, Commissioner Diane Hanson, Commissioner Mike Dunmeyer, Commissioner Gary Persinger, and the “Residents” of the Town. The introduction set the stage, identifying the purpose of the Letter, indicating that the signatories viewed themselves as whistleblowers under Title 19, Chapter 12 of the Delaware Code, and offering to testify under oath in open court as to the facts detailed:

This letter is written by and on behalf of the employees of the Town of Dewey Beach who have signed their names below.

The purpose of this letter is to demand, for the reasons set out below, the immediate and permanent removal of Mr. Marc Appelbaum as Town Manager.

We are exercising our rights as whistleblowers under Delaware Code Title 19, Chapter 12 to report egregious misconduct, including

¹⁰³ Town Code, Chapter 10, § 10-3 B.

¹⁰⁴ *Id.* § 10-3 J.

violations of multiple provisions of the Delaware Code, common law, and Title VII of the Civil Rights Act of 1964.

Each of the numbered paragraphs below is a complaint against Mr. Appelbaum which is based upon *personal observation* by an employee (or employees) of the Town of Dewey Beach. The eyewitnesses to the acts described below are prepared to testify under oath, and in court, as to the facts detailed.

Each of these violations has been reported to one or more Town Commissioners, who have done nothing to remedy these violations but rather have intentionally turned a blind-eye, while allowing Mr. Appelbaum to run roughshod over the rights of employees and citizens of the Town.

The Letter contains 42 enumerated paragraphs, organized into subsections: (1) Sexual Harassment; (2) Abusive Conduct Toward All Employees/Lack of Professionalism; (3) Racial Discrimination; (4) Improper Interference With Town Law Enforcement; (5) Jeopardizing Public Safety by Improper Interference with Dewey beach patrol; (6) Improper Interference with the Office of the building inspector; (7) Other Improper/Dishonest Dealings. Each of the 42 numbered paragraphs is included here verbatim, in the order they were included in the Letter, with our findings for the claims included below each paragraph. Any misspellings or grammatical items in the numbered paragraphs are from the original.

A. SEXUAL HARASSMENT: Mr. Appelbaum routinely engages in acts of sexual harassment in violation of Title VII of the United States Code and Section 710 of Title 19 of the Delaware Code. Mr. Appelbaum’s sexual harassment of women has been known to some of the Commissioners since at least 2010—prior to Mr. Appelbaum’s appointment as Town Manager. Despite their knowledge of documented allegations of harassment by Mr. Appelbaum, the Commissioners appointed him to Town Manager where they knew he would be in a position of authority over several women. The Commissioners’ conduct evidenced a reckless disregard for the rights of female Town employees to be free from harassment and discrimination in the workplace and established a policy at the highest levels of Town government to allow the harassment of female Town employees. As Town Manager, Mr. Appelbaum has harassed and discriminated against women in the following ways:

- 1. Mr. Appelbaum wears pajama bottoms into the office, often without underwear, intentionally making the outline of his penis visible to female employees;**

Mr. Appelbaum denied wearing pajama bottoms but did admit that he occasionally wore sweatpants to Town Hall. Many individuals confirmed that they would see Mr. Appelbaum wearing the sweatpants or pajama bottoms early in the morning – his routine would be to leave his house dressed in pajama bottoms or sweat pants and to walk next door to Town Hall around 6:00 a.m. to work before the other employees arrived. Then, around 9:00 a.m., Mr. Appelbaum would return home to shower and change – he would then return to Town Hall dressed in street clothes. We find the allegations that he has worn pajama bottoms to the office credible, although we find that this was probably a limited number of times and less often than he has worn sweatpants to the office. None of the individuals interviewed stated that they were under the impression he was not wearing underwear, and none of the individuals stated that they saw the outline of his penis through the pants, although at least one witness stated that the pants are thin. We therefore were unable to substantiate the portion of the allegation that Mr. Appelbaum wears his sweats or pajama bottoms “often without underwear, intentionally making the outline of his penis visible to female employees” and find it not credible.

2. **On one occasion when Mr. Appelbaum wore pajama bottoms, without underwear, into the office, he ordered two female employees into his office where he proceed to stand in front of his desk with an obvious erection. The two women were seated in chairs in front of Mr. Appelbaum’s desk. Mr. Appelbaum was standing in front of his desk and close to the two women, such that his erection was near their eye level. When a male employee walked into Mr. Appelbaum’s office and saw what was happening, Mr. Appelbaum screamed, “Get out, shut the door!”**

Todd Fritchman is the only employee who claims to have witnessed the incident described in this allegation. The incident he recounted in his interview bears only a vague resemblance to the allegation – he says he saw Mr. Appelbaum wearing “Rasta clothing” and that he was leaning back, sitting in front of his desk “supine with his pelvis obviously pointed toward” Jane Doe 6 and Jane Doe 13 seated in front of him. Mr. Fritchman claims he walked into the room, said “oops,” and then walked out as Mr. Appelbaum yelled to shut the door. Jane Doe 6, Jane Doe 13, and Marc Appelbaum all denied that this incident ever happened. Given the lack of corroboration by the two women supposedly subjected to the alleged conduct, and the discrepancies between the allegation and the lone witness’s recount of the incident, we find this allegation without merit.

3. **Mr. Appelbaum frequently wears no shoes in the office and on at least one occasion has rubbed his bare leg and foot on the leg of a female town employee in a suggestive manner, which she found repulsive.**

Most of the witnesses confirmed that they have seen Mr. Appelbaum barefoot in the office – Mr. Appelbaum himself admitted that he walked around barefoot at times. The incident referenced in this paragraph was confirmed by Jane Doe 11, who identified herself as the female employee, and Chief Mackert, who personally witnessed the incident. Mr. Appelbaum denied this incident occurred. Jane Doe 11’s and Chief Mackert’s accounts of the incident were similar: a few years ago, before Chief Mackert’s heart attack (Jane Doe 11 thought it happened as early as 2012), Mr. Appelbaum came over to the police department to Jane Doe 11’s work space. Jane Doe 11 was seated cross-legged in her desk chair while Mr. Appelbaum and Chief Mackert remained standing. Mr. Appelbaum then slipped his sandal off his foot and placed his bare foot against Jane Doe 11’s thigh and rubbed it up and down her thigh more than once. Jane Doe 11 expressed disgust

and told Mr. Appelbaum never to do that again. Mr. Appelbaum laughed and took his foot away. We find the testimony of Jane Doe 11 and Mr. Mackert credible, and therefore find that this allegation has (more likely than not) been substantiated.

Jane Doe 11 said she told other co-workers about the incident but did not report it to the Solicitor, the Mayor, or the Commissioners. Chief Mackert said that he asked Jane Doe 11 what she wanted to do about it, but that she felt intimidated and did not bring it up the chain. Chief Mackert said that he told Commissioner Legates and Commissioner Mauler about the incident but their response was that they wished Jane Doe 11 would come forward with the allegation. Nothing further, to Chief Mackert's knowledge, was done about the incident. Chief Mackert could not recall how much time had passed, if any, between the incident and bringing it to the attention of the Commissioners.

We find that the Town's policy on reporting and investigating an incident of sexual harassment was not followed here.¹⁰⁵ First, Jane Doe 11 did not submit a written report of the alleged act to her supervisor (Chief Mackert) and the Commissioners (as required when the Town Manager is involved), perhaps for two good reasons: (1) her supervisor personally witnessed the incident, obviating the need to inform him in writing; and (2) according to Chief Mackert, she did not wish to do anything about it. Chief Mackert attempted to inform the Commissioners about the incident, although it is unclear when he made this report and whether the individuals he told were then acting as Commissioners. We believe this incident illustrates a need for the Town to train its employees on recognizing and reporting incidents of sexual harassment and to revise its policy to allow for alternate methods of reporting an incident of sexual harassment in the first instance in order to trigger an investigation.

¹⁰⁵ Manual Section 4-12.

4. **Mr. Appelbaum frequently tells sexual stories and jokes, as well as makes sexual comments and innuendo, to women in the office with the obvious intent of embarrassing and humiliating them. This conduct includes yelling the word “fornication” at the top of his lungs during a staff meeting.**

Sexual Stories and Jokes Allegation

The consensus appears to be that Mr. Appelbaum tells “off color” or “crude” stories or jokes, but that most employees do not find them sexual in nature, or made with the intent to embarrass or humiliate anyone. What one employee considers “colorful” (i.e. a joking reference to rape, as John Doe 1 and Jane Doe 1 reported hearing) may be considered by another employee to be an offensive sexual story or joke. Thus, this allegation turns completely on each individual employee’s perception, and it is difficult to sift through the subjective statements to reach an objective conclusion as to the nature of the jokes or stories. We note that Mr. Fritchman stated in his interview that Mr. Appelbaum would “allude to female behavior and anatomy” and make “sexual innuendos,” and then say in Jane Doe 6’s presence “[Jane Doe 6] can attest to that.” Jane Doe 6 confirmed hearing Mr. Appelbaum tell jokes but denied they were sexual, and denied hearing stories suggesting sexual innuendo.

Jane Doe 7 has stated that she witnessed Mr. Appelbaum joking and making comments, and then following them up with “oh, I guess that’s considered sexual harassment.” Jane Doe 9 described how an interaction with Mr. Appelbaum could be misinterpreted by bystanders. For example, she would say “I have enough information” to finish a project, and he would respond with “no one has said that to me in a long time,” and the people in the vicinity would laugh. Jane Doe 9 said she was not offended by this kind of exchange, and did not believe others were offended, but the import of her statement was that it was possible the exchange could be misconstrued as a sexual story or joke.

Chief Mackert recalled a meeting on March 16, 2017 in the parking annex where Mr. Appelbaum made a reference to “zippers,” and said to Jane Doe 6 that one day she would learn the difference between boys and girls. Chief Mackert said that he recalled Mayor Cooke was in that meeting and put his head down when he heard the comment. Only Jane Doe 7 corroborated that a comment was made about zippers in a meeting that took place on May 16, 2017, rather than March

16.¹⁰⁶ Given the vague description of the story, it is difficult to conclude that this is an effective example of a sexual story or joke told by Mr. Appelbaum, but it certainly could be perceived as an inappropriate comment.

A more recent example occurred after the June 14th Letter was published. Four witnesses, including Mr. Appelbaum himself, confirmed that he told a story in July 2017 about a woman adjusting her breasts outside of his window before she entered Alderman Court. John Doe 13 described the story in an apparently contemporaneous note and which Chief Mackert says he found taped to his door the Monday following the incident.¹⁰⁷ Only Chief Mackert mentioned the note, and John Doe 2 and John Doe 13 were the only two other employees who corroborated that the story was indeed told. John Doe 13's chief concern in reporting the incident was that he was made uncomfortable by the fact that Mr. Appelbaum told the story – in a very demonstrative way and using the word “tit” or “titties” to refer to the woman’s breasts – in front of Jane Doe 10, and the “ladies” at the front office where he delivered voided parking tickets. When asked about the story, Jane Doe 10 could only say that it was “possible” that Mr. Appelbaum told this story, but that she could not recall it. Given the freshness of the incident, this gives us some pause as to the impact the story had on the ladies who supposedly witnessed this story. However, because Mr. Appelbaum has admitted to telling it (albeit without telling us to whom he told this story and when), we find that this story was probably told in front of some female employees.

Fornication Allegation

Chief Mackert testified that the source for the “fornication” allegation was a March 15, 2017 staff meeting at which Jane Doe 6, Jane Doe 10, Jane Doe 2, Bill Mears, John Doe 15, Jane Doe 13, Jane Doe 1, John Doe 1, Jane Doe 4, Chief Mackert and Marc Appelbaum were present. Chief Mackert says Mr. Appelbaum yelled the word “out of the clear blue,” which startled people, and in the context of

¹⁰⁶ Jane Doe 7’s contemporaneous notes taken during a May 16, 2017 meeting read: “Marc zipper comment to Jane Doe 6 then said oh that might be sexual harassment – Mayor put his head down and shook it.” She described the comment in her interview as follows: “And then in our meeting on 5/16 in the Code Enforcement building, I think that was Exhibit One or Two, Two maybe, yes, at the end of the meeting, he made a comment to Jane Doe 6, [REDACTED], [REDACTED], about whether or not she has learned the difference between a man’s zipper and a woman’s zipper. And she just kind of laughed and turned away. And then he is like, oh, I guess that falls under sexual harassment, too.”

¹⁰⁷ The handwritten note is attached as REP 123-24.

relating complaints they were getting about people “fornicating” on the beach. John Doe 4 said he could hear the word yelled from where he sat at his desk in the Squad Bay, about 40 feet away. Mr. Appelbaum denied this allegation, as did Jane Doe 2, Jane Doe 13, John Doe 1, and Jane Doe 4. Jane Doe 10 confirmed hearing the word but believes it was said in a joking manner – she did not take offense to it and said “everyone laughed.” Other witnesses recalled hearing Mr. Appelbaum say the word in other contexts, *i.e.*, at a Commissioner’s public meeting, and in passing or in conversation with employees at Town Hall.

Given the testimony, it appears that Mr. Appelbaum has used the word on perhaps more than one occasion, including one in which he yelled it during a staff meeting. Again, no female employee has reported being offended by it, and the male employees who claim to feel uncomfortable or offended on behalf of the female employees did not report this incident to the Commissioners, to the Mayor, or to the Town Solicitor prior to this Letter.

5. Mr. Appelbaum constantly uses the word “fuck” or “fucking” in the office and makes other obscene remarks in the presence of female employees.

Most employees confirmed that Mr. Appelbaum has used these words in the presence of female employees. Many employees further confirmed that other Town Hall and police-side employees use these words. There is no evidence of other obscene remarks made as the allegation states. Only one employee, Mr. Fritchman, has testified to Mr. Appelbaum’s “obscene” remarks in the presence of females; however, outside of the alleged “sexual stories” that Jane Doe 6 denies hearing, the examples he provides (*i.e.* Mr. Appelbaum referring to himself as Jewish, and “drug and alcohol talk and irrelevant talk”) do not meet an objective standard of obscenity.

6. Mr. Appelbaum’s often directs his obscenities at female employees to intimidate them and make them subservient, two female employees have already left as a result of this conduct.

No employee has confirmed that Mr. Appelbaum *directs* obscenities to female employees, let alone to intimidate them and to make them feel subservient. We note that Mr. Fritchman recalled Mr. Appelbaum directing obscenities toward him when he disagreed with him. There is evidence, however, from several employees that the “cold” environment (as contributed to by Mr. Appelbaum) has

led to one employee – Jane Doe 8 – leaving the Town’s employment. Based on Jane Doe 8’s testimony we do not find that her concerns amount to more than her feeling excluded and unappreciated by the other town hall employees – “team town hall” as she referred to them. She did not say that the “toxic” atmosphere was due to any obscenities uttered by Mr. Appelbaum; she confirmed hearing them but denied that they were directed to her.

Jane Doe 12, the other female employee referred to in this allegation, testified that she left the Town’s employment in part because of the treatment she received from Mr. Appelbaum based on her race. That is discussed in more detail below, in response to allegation number 18.

- 7. Female employees who accept Mr. Appelbaum’s humiliating treatment without complaint are rewarded with advancement, to the detriment of those who resist or complain; in this way, Mr. Appelbaum attempts to coerce the objecting women to submit to his unlawful and offensive behavior without complaint.**

This allegation appears to be an attack on the promotions and pay increases given to certain Town Hall female employees, Jane Doe 6 and Jane Doe 13 among them. Given the significant overlap with the responses to allegation number 8, both allegations are discussed below under paragraph 8.

- 8. Mr. Appelbaum does not pay female Town employees equally and based upon their professional skills but rather rewards and pays fairly only those women who submit to him.**

While this allegation appears to suggest a pay differential among female employees as compared to number 7, which only references “advancements,” the witnesses tended to speak about both pay increases and advancements together. There appears to be two instances of advancement that may be mentioned here: Jane Doe 6 was, in some people’s view, “promoted” [REDACTED]. In addition, individuals view Jane Doe 13’s [REDACTED] as a promotion.

The placement of this allegation under the “sexual harassment” section of the Letter suggests that it is made in advancement of a “*quid pro quo*” theory of

sexual harassment – i.e. that Mr. Appelbaum makes submitting to sexual harassment a requirement for receiving pay increases or promotions. Facially, this allegation (in theory) might have some appeal: Jane Doe 6 who has received pay increases at rates disproportionate to other town employees, denies that Mr. Appelbaum sexually harasses female employees or creates a hostile work environment. The same might be said of Jane Doe 13, [REDACTED], and who also denies witnessing or experience sexual harassment at work by Mr. Appelbaum. But, this is only an appearance that fails to find support in the testimony of employees and documents provided.

What does emerge from an examination of the evidence we gathered is the more likely case that Mr. Appelbaum has “favorites” – good employees who he rewards and generally treats favorably. The evidence tends to show that the employees in the administrative department of Town Hall are favored over the Alderman Court employees and the police department employees – male or female. Consider the following evidence.

Jane Doe 6 was hired to replace Jane Doe 12 in December of 2013. Since then, she has received an increase in pay from \$33,999.94 in 2014 to \$45,000.02 in 2017. We are aware of no other employee that has experienced this degree of pay increase in this period of time. Further, Jane Doe 6 has stated that she does not find Mr. Appelbaum’s behavior at work offensive, and has generally denied the allegations in this section of the Letter.

Jane Doe 13 began her employment with the Town in 2012 [REDACTED]

In 2016, she [REDACTED]

transitioned to the administrative side. In 2015 she earned \$11,076.00 with the police department; but in 2016, her salary was increased to \$32,000.02 as the new Director. Jane Doe 13 also generally denied witnessing instances of sexually harassing or similar inappropriate conduct by Mr. Appelbaum. [REDACTED]

Compare Jane Doe 6’s and Jane Doe 13’s advances or pay increases with that of Jane Doe 8. Jane Doe 8 transitioned from [REDACTED] to [REDACTED] in or around 2012 (she could not recall the exact year). She said that when she was employed [REDACTED] she would receive a 3% annual

raise – she believed all Town employees received this raise.¹⁰⁸ But, she said that at first she did not receive this raise and believed she was being “jumped over” because she was not a “team player,” and was not part of “team town hall.” Jane Doe 4 testified that Jane Doe 8 came to her and asked for a raise, and that she requested a raise for Jane Doe 8 in FY2013-2014 budget. The next year, according to Jane Doe 4, she requested raises for everyone [REDACTED], but was denied. When she confronted Mr. Appelbaum about it, he was evasive and did not give her a straight answer.

Perceptions aside, from the records we have, Jane Doe 8 did not receive a raise in 2014. According to the records we were provided, the only female employees who received raises that year were Jane Doe 6, Jane Doe 11, and a woman named Jane Doe 14; both Jane Doe 11 and Jane Doe 14 worked for the police department. The following year, 2015, Jane Doe 8 requested and received a raise, [REDACTED]. In 2016 every female employee except Jane Doe 9 received a pay increase. In 2017, only Jane Doe 6 and Jane Doe 13 received increases.

A few other employees’ statements are worth considering here. First, as stated by Jane Doe 7 and corroborated by Jane Doe 4, Mr. Appelbaum resisted hiring Jane Doe 7 in May of 2017. According to Jane Doe 4, it stems from an incident where Jane Doe 7, working as police dispatcher at the time, closed a door while Jane Doe 6 was standing there; Jane Doe 6 claimed she had closed the door in her face. Jane Doe 7 was told, unlike Jane Doe 8 who formerly held her position, that she reported to Mr. Appelbaum, and that she needed to tell Jane Doe 6 when she [REDACTED]

Second, John Doe 4’s statement about a meeting he and Jane Doe 11 attended with Mr. Appelbaum bears mention here. It was the Joe Doe 4’s impression that he and Jane Doe 11 had to go before Mr. Appelbaum in person to justify why police department leadership thought Jane Doe 11 should receive the

¹⁰⁸ The Chief of Police determines the pay rates for all Police Department employees. Chief Mackert has made a practice of providing an annual across-the-board pay increase for all regular employees, and includes the cost of this increase in his annual budget proposal. The evidence demonstrates that his annual proposed budgets are regularly approved, with enough of an increase from the prior year to support pay increases that he has determined are appropriate. Jane Doe 8’s experience of receiving an annual increase while employed with the Police Department, tracks directly with this practice. There is not—and there is no evidence that there has been—a similar regular, across-the-board pay increase standard for the Town’ administrative employees.

general departmental pay increase. It was also Joe Doe 4's impression that this was a humiliating experience for Jane Doe 11. Thus, while the salary and pay increases that the police department employees receive are up to the Chief to decide, there does appear to be some input from Mr. Appelbaum, at least in this incident with Jane Doe 11.¹⁰⁹

In sum, the evidence is inconclusive as to whether Mr. Appelbaum rewards certain female Town employees over other departments' employees. The witnesses' statements do support the idea that he has a band of followers within his office, including the "mom squad" as some administrative employees refer to it, consisting of female employees who seek part time positions with the Town for the flexible hours. These women (Jane Doe 2 and Jane Doe 1) are extremely well-qualified for their positions (Jane Doe 2 has an MBA in international finance, and Jane Doe 1 has a Master's degree). In addition, it is objectively evident that Jane Doe 6 and Jane Doe 13 have been receiving advances in pay in connection with advances in their positions and responsibilities. However, claiming that this is in exchange for submitting to sexual harassment is, at best, a subjective perception that cannot be corroborated. And, at least for police department employees such as Jane Doe 11, their pay rates and pay increases have been determined by the Chief of Police.

A more plausible explanation for recent differences in pay or advancement is that Mr. Appelbaum may favor those loyal to him, particularly those he views as competent and productive. As we understand it, the Town has no designated pay rates, pay grades or compensation schedules, leaving such determinations to the Town Manager's (or Police Chief's) discretion. Exercise of this discretion does not inherently violate the Town Charter, Town Code, or federal or state law. However, the inconsistent exercise of such discretion, particularly when it may be for demonstrably improper purposes, or results in actionable disparate impact without justification, might create liability for the Town. At the moment, however, while some aspects of Mr. Appelbaum's compensation decisions may be bad for morale, there is no evidence that they constitute improper conduct.

¹⁰⁹ Mr. Appelbaum acknowledged that he questioned annual raises for John Doe 5 and Jane Doe 11, but that he ultimately did not oppose them. John Doe 5 and Jane Doe 11 provide administrative support to the police department, and are considered employees of the department.

9. The signed employees below have frequently witnessed female employees crying when leaving Mr. Appelbaum's office.

Three employees who signed the Letter – Bill Mears, Jane Doe 11, and Todd Fritchman – as well as Jane Doe 8 and Jane Doe 10, say they have seen Jane Doe 15 leaving Mr. Appelbaum's office crying. Jane Doe 15 was the former [REDACTED]. According to them, Jane Doe 15 had come to them crying because Mr. Appelbaum had taken issue with how she was doing her job, or reprimanding her in some way. On one particular incident, Jane Doe 15 was allegedly crying after Mr. Appelbaum purportedly threatened to fire her if he ever found out it was her who was leaking the news of his car accident in New Orleans, or his daughter's traffic citation while using the Town car.

A few employees who signed the Letter claimed they personally witnessed Jane Doe 8 with "tears in her eyes" when she came over to the police side, although they were not sure if she had just left Mr. Appelbaum's office. According to John Doe 2, Jane Doe 8 would complain of how Mr. Appelbaum was constantly badgering and micromanaging her, and making her feel like she was not doing her job the right way. John Doe 2 denied hearing her say that Mr. Appelbaum sexually harassed her.

John Doe 4 stated that Jane Doe 11 was very "emotional" following the meeting he and Jane Doe 11 had in Mr. Appelbaum's office to discuss her recent pay increase. This incident is discussed in detail more above in response to allegation number 8.

Jane Doe 6 stated she observed Jane Doe 13 crying in Mr. Appelbaum's office during a meeting in which Jane Doe 13 was reporting that she did not believe she was being treated fairly by members of the police department. Evidently this occurred prior to Jane Doe 13 assuming her current role with the Town.

This is a difficult allegation to substantiate. But, there seems to be sufficient anecdotal evidence to conclude that female employees likely have left Mr. Appelbaum's office in tears; for any number of reasons it appears. We cannot conclude, however, that there is any evidence to demonstrate these women were crying as a result of experiencing sexual harassment by Mr. Appelbaum.

B. ABUSIVE CONDUCT TOWARDS ALL EMPLOYEES/LACK PROFESSIONALISM: Through a pattern and practice of bullying, including derogatory remarks and interference with job responsibilities, Mr. Appelbaum conveys to Town employees that he can do whatever he wants with impunity. This impression is reinforced by Town Commissioners and the Mayor when they fail to take any action in response to known misconduct by Mr. Appelbaum.

10. Mr. Appelbaum frequently screams and swears at Town employees, denigrating them in front of co-workers. This conduct includes “giving the finger” to employees, and even to the Mayor, when his back was turned.

For purposes of this allegation, it is appropriate to differentiate between “yelling” and “screaming.” “Yelling” refers to speaking in a loud voice, whereas “screaming” refers to an individual raising their voice in an unprofessional manner. Numerous interviewees described Mr. Appelbaum’s process of summoning employees to his office; he will frequently yell an employee’s name from his office, which is located in the back of the building next to the Alderman Court. For example, almost every witness who works in Town Hall confirmed that when he is in his office, Mr. Appelbaum will yell for Jane Doe 6, who sits in the front of the building near the lobby, rather than use an available intercom. This is how Mr. Appelbaum makes Jane Doe 6 aware that he would like to discuss something with her.

Jane Doe 6 does not view this behavior as inappropriate: “Sometimes he doesn’t use the intercom; he’ll just yell someone’s name, but not in an inappropriate manner. He’s just getting someone’s attention.” Jane Doe 6 also denied that Mr. Appelbaum has screamed at her, stating: “[h]e has not screamed at me. Again, he doesn’t use his intercom, so he will yell names down the hall sometimes if he wants to talk to someone, but he has never screamed directly at me.” Jane Doe 6 recounted that Mr. Appelbaum has yelled for Jane Doe 3, Jane Doe 1, and Jane Doe 10, but reported that no one has complained to her about the conduct. There are, however, employees who have observed Mr. Appelbaum yelling for his staff without using the intercom who believe the behavior is unprofessional. Jane Doe 7 described it as “derogatory.”

Despite this, it is more likely than not that on more than one occasion, Mr. Appelbaum has screamed at Town employees in anger and frustration. Mr. Mears

recounted one incident of Mr. Appelbaum engaging in a shouting match with him, which was confirmed by Jane Doe 2. Mr. Fritchman claims that Mr. Appelbaum has screamed at him “many times” for “[j]ust not agreeing with what he says.” However, we could confirm only one instance of Mr. Appelbaum screaming at Mr. Fritchman, and that was before the Memorial Day weekend in 2017.¹¹⁰ We also believe that Mr. Appelbaum acted unprofessionally toward Jane Doe 7 in a meeting in his office on May 30th or 31st of this year. According to Jane Doe 7, Mr. Appelbaum, Jane Doe 1, and Jane Doe 6 were with her in Mr. Appelbaum’s office when Mr. Appelbaum stood up from his chair and shouted the question “who do you think you report to?” Jane Doe 7, who views her role as exclusively related to the Courts, responded that yes, she knew who she reported to. In response, Mr. Appelbaum continued to raise his voice stating “You don’t report to the judge. You don’t report to the courts. You don’t report to DELJIS. You report to me.” Jane Doe 7’s specific complaints are discussed in more detail below.

For his part, Mr. Appelbaum admitted that he summons employees to his office or asks them to get him something by yelling their names. He also admitted to being “pretty expressive” in the office. Mr. Appelbaum denied that he swore *at* employees, but admitted swearing *with* employees. Many of the individuals who work closely with Mr. Appelbaum corroborated his use of profanity in the office, but characterized the behavior as “joking” or otherwise harmless. John Doe 1 said that Mr. Appelbaum used profanity, but does not direct it at any person in particular.

Chief Mackert made a direct claim that Mr. Appelbaum’s conduct was degrading towards him, asserting that Mr. Appelbaum’s conduct had contributed to his health complications: “What he’s put me through there and the stress and the way he has degraded me and treated me around that place there -- I know it’s impossible to prove that he had anything to do with my health” A similar claim was made by Mr. Mears in a document he provided.

Finally, it is clear that the act of “giving the finger” is not unusual at Town Hall. Although Mr. Appelbaum denied giving the finger to Town employees,¹¹¹ he readily admits that Town employees and even the Mayor have given the finger to

¹¹⁰ This incident was independently described by Jane Doe 4.

¹¹¹ Q: Have you ever given the middle finger, which I assume is what they are talking about, to Town employees?

A: Not that I can recall.

him, although he took these incidents “as a joke.” However, even those employees who speak generally in favor of Mr. Appelbaum, such as Jane Doe 6, admit that he has given them and other employees the finger, albeit in a joking manner, and that they have witnessed this conduct approximately twice per month.¹¹²

From this, we can conclude that Mr. Appelbaum has on occasion raised his voice to employees, used profanity in the office, and exchanged the middle finger with employees, including the Mayor, but we cannot conclude that this conduct was at all times intended to denigrate employees in front of their co-workers, or that the conduct was viewed as doing so.

- 11. In violation of the Dewey Beach Town Charter, Mr. Appelbaum has repeatedly advised Town employees that they are not allowed to attend or speak at Town meetings and may not answers questions posed by the public or the Commissioners, even on matters related to their area of expertise. This policy established and enforced by Mr. Appelbaum also violates their First Amendment rights under the United States Constitution.**

There is generally no credible evidence that Mr. Appelbaum has “advised Town employees that they are not allowed to attend or speak at Town meetings.” Under Delaware law, Town meetings are open to the public and subject to certain notice provisions. Some Town employees, such as Jane Doe 6, regularly attend Town meetings in conjunction with their job responsibilities. Jane Doe 6 also testified that Mr. Appelbaum encourages employees to attend meetings, and give their feedback. She also stated that she had seen Todd Fritchman, Jane Doe 9, Chief Mackert, and John Doe 2 at Town meetings.

Chief Mackert testified that at one Town meeting, either Mr. Appelbaum or the Mayor told him to leave, but that Commissioner Persinger called Chief Mackert back in. Afterwards, according to Chief Mackert, the Mayor told the Chief that the Chief didn’t have to attend Town meetings and that the Chief could “utilize [his] time more efficiently doing other things.” Chief Mackert interpreted the Mayor’s statements as “you don’t need to come to the meetings if you don’t want to.” Yet, even after the incident, Chief Mackert stated that he continued to attend Town meetings, which Mr. Appelbaum corroborated. Mr. Mears testified

¹¹² Mr. Mears and Mr. Frichman both assert that Mr. Appelbaum has given them the finger in a non-joking manner.

that Mr. Appelbaum never stated that he or any other employee was barred from the meetings. Although he claims Mr. Appelbaum prevents him from attending meetings, Mr. Fritchman admitted that “[i]t’s a public meeting, so I’m obviously allowed to go if I wish.” No other employee stated that Mr. Appelbaum had forbidden them from attending Town meetings.

We also cannot conclude that Mr. Appelbaum has instituted a policy that employees “may not answer questions posed by the public or the Commissioners.” Chief Mackert testified that in 2013 or 2014, Mr. Appelbaum requested that police employees refrain from discussing certain matters with Commissioner Mauler without Mr. Appelbaum being present, and this is corroborated by documents provided by Mr. Mauler. At one point in time, Mr. Fritchman was asked to submit a written annual report on lifesaving in lieu of an oral report to the Commissioners. However, none of these incidents is evidence of a policy by Mr. Appelbaum to actively prevent Town employees from speaking to or working with the Commissioners. Mr. Appelbaum, has, however, requested that he be present if Town employees are speaking with Commissioners.¹¹³

12. Mr. Appelbaum actively obstructs Town employees from carrying out their job requirements, regardless of the risk to public safety.

Specific allegations of Mr. Appelbaum interfering with Chief Mackert, Mr. Fritchman, and Mr. Mears are addressed in response to Letter paragraphs 21-33. John Doe 1, Jane Doe 6, Jane Doe 3, Jane Doe 13, Jane Doe 10, Jane Doe 2, Jane Doe 1, and John Doe 5, denied that Mr. Appelbaum obstructs them from completing their job responsibilities, although Jane Doe 10 acknowledged that Mr. Mears felt that Mr. Appelbaum was interfering with his responsibility as building inspector.

John Doe 2 stated that he used to be responsible for the police department’s press releases, but that he no longer does them because of Mr. Appelbaum’s interference and micromanaging. According to John Doe 2, the practice of releasing statements to the press ceased sometime in 2016. John Doe 7 stated that he felt Mr. Appelbaum’s involvement in addressing the numerous fights that had at one time occurred at Northbeach’s dollar drink night constituted interference.

¹¹³ REP 64-65.

Jane Doe 7 stated that Mr. Appelbaum continually interferes with her ability to do her job by attempting to assign her tasks outside the scope of her position as Court Clerk, and by having her report to Jane Doe 6. Jane Doe 7 stated that the restrictions hinder her from doing her job. Jane Doe 4 confirmed this and stated that she had approached Mr. Appelbaum about his attempts to involve Jane Doe 7 in parking and code enforcement responsibilities. Essentially, while Jane Doe 7 was getting up to speed on the new job, she would be asked to “walk the town” to assist with parking matters. This concerned Jane Doe 4 as a potential separation of powers violation. Jane Doe 4 also confirmed Jane Doe 7’s statements that she is unable to move about Town Hall, [REDACTED] because she does not want to interact with Mr. Appelbaum.

[REDACTED]

[REDACTED]

The testimony on this issue reiterates the fact that Town administration employees are spared Mr. Appelbaum's micromanagement practices, while employees in other departments are often questioned as to their motivations and competency. We can conclude that Mr. Appelbaum has micromanaged certain employees. We also conclude that Mr. Appelbaum has probably interfered with [REDACTED], and with Jane Doe 7 [REDACTED]. We cannot conclude that this conduct endangered public safety.

13. **Mr. Appelbaum frequently insults and denigrates Town Commissioners and the Mayor, both in their presence and when they are not present, in order to show Town employees that the Commissioners and the Mayor will not stand up to him, positioning himself as the ultimate authority on all matters pertaining to the Town, including the conditions of their employment. In this way, Mr. Appelbaum signals to the employees that they have no recourse or venue in which to complain about his conduct and intimidates them into either accepting his egregious behavior or leaving their positions. Long-time employee Barbara Kyewski quit earlier this year after 10 years on the job, stating, “I can’t stand it any longer working for that man, it’s unbearable.” Similarly, Katrina White, who worked for the Police Chief for 4 years and then worked in the Town Hall as a clerk, quit saying she could no longer put up with Mr. Appelbaum’s sexual innuendos and harassment. Current employee Sheena Gossett has complained to the Town Clerk that Mr. Appelbaum’s constant swearing and sexual talk is offensive and affront to her religious beliefs. Under Section 16 of the Town Charter, the Commissioners are the appellate body for “the protection of Town employees” against improper job actions by the Town Manager. Because Town employees witness the level of authority possessed by Mr. Appelbaum and the bullying of the Mayor and Commissioners by Mr. Appelbaum, they understand that there is no real recourse for them should they be fired by Mr. Appelbaum. In short, they are required to shut up and take it.**

This layered allegation raises several issues. The first is whether Mr. Appelbaum denigrates the Mayor and Commissioners. Testimony indicates that Mr. Appelbaum has made comments outside the presence of the Mayor and Commissioners questioning their decisions and competency. In particular, he has criticized former Commissioners Mauler and Legates, and Mayors Hanson and Cooke. Indeed, Mr. Appelbaum is not hesitant to share his opinion.

The second issue is whether former employees Jane Doe 8 and Jane Doe 12 left their employment as a result of Mr. Appelbaum’s behavior. Both women stated that Mr. Appelbaum’s behavior precipitated them leaving their positions,

raising real concerns about Mr. Appelbaum's behavior toward them. However, both contemporaneously conveyed to their coworkers independent rationales for leaving their positions, that had nothing to do with Mr. Appelbaum's alleged conduct.

Jane Doe 12 testified that Mr. Appelbaum acted inappropriately in the office by using the term "the brown people," swearing, and showing disrespect for Jane Doe 12's Christian religion. She also stated that Mr. Appelbaum was a micromanager who questioned the way in which she carried out her job responsibilities. Jane Doe 12 felt that Mr. Appelbaum scrutinized her work more than he did her coworkers. She appears to have made the decision to leave her employment with the Town after Mr. Appelbaum made a comment that he at one time managed thirty African-American employees, and they were "some of the dumbest people that he ever worked with." That comment, along with the other conduct she described, led her to conclude: "I had to leave. I couldn't work under that." Although she never filed a complaint, she asserts that she did relay the conduct to Diane Hanson during an exit interview.¹¹⁴

Based on her testimony, we find it more likely than not that Jane Doe 12 was offended by Mr. Appelbaum's use of the term "brown people." Her testimony is corroborated by Jane Doe 11's testimony to the same effect.¹¹⁵ She also disliked his comments regarding religion and his management style. Although, several witnesses stated that Jane Doe 12 took a new position with [REDACTED] because it was closer to home, these individuals also stated that they had had few if any conversations with her prior to her departure. She confided to Chief Mackert that Mr. Appelbaum used the term "brown people," but neither Chief Mackert, nor any other witness, including Jane Doe 12, stated that she had been sexually harassed by Mr. Appelbaum. Therefore, we cannot conclude that Jane Doe 12 left as a result of Mr. Appelbaum's use of sexual innuendos. Rather, Mr. Appelbaum's use of the phrase "the brown people" likely contributed to Jane Doe 12's decision to seek alternative employment.

¹¹⁴ Commissioner Hanson denies that an exit interview ever occurred.

¹¹⁵ Q: Did Jane Doe 12 share with you the reasons why she left Town employment?

A: Yes.

Q: What did she share with you?

A: His manner of professionalism and the brown people jokes.

When Jane Doe 8 was asked to explain the “toxic environment” she referenced in her complaint, she described “the coldness, the rudeness, the inability to feel comfortable doing my job or even going back and forth to the court.” She stated that she felt she had to leave her employment: “Work was no longer a very pleasant place to be when there was interaction with Marc or with Town Hall.” She went on to state: “at some point I decided, no, I’m done tolerating. So that’s when I made the decision to leave.” However, Jane Doe 8 also communicated to several of her coworkers that she wished to move [REDACTED] to be closer to her grandchildren. Balancing the testimony, we find that while Jane Doe 8 had personal reasons for leaving her employment, Mr. Appelbaum’s conduct in the office likely contributed—or would have contributed—to Jane Doe 8’s decision to seek alternative employment, or otherwise leave her position with the Town.

While some of the statements in paragraph #13 in have been corroborated in concept, Jane Doe 3 unqualifiedly denied the statement attributed to her. She testified that she has, “no idea who would come up with anything or why I would be singled out and why I would be chosen as having said anything of that nature.”

Finally, this paragraph alleges that Mr. Appelbaum is a “bully” who has been able to control the Mayor and Commissioners in a way that effectively negates any appellate or supervisory authority of the Mayor or Commissioners. As a result, this paragraph alleges, employees are required to “shut up and take it.” No testimony or documentary evidence demonstrates that Mr. Appelbaum has circumscribed the appellate authority of the Mayor and Commissioners. There is no evidence that he has fired or otherwise disciplined any employee, who was then thwarted from challenging such action by Mr. Appelbaum’s interference or “control” over the Mayor and Commissioners. There is no evidence that any of the Complainants, or other Town employees they have referenced, ever sought to avail themselves of a formal grievance process, but could not do so because of some hypothetical impediment created by Mr. Appelbaum. Nor have the Town Commissioners disavowed the Town’s policies and procedures in a way that would expand Mr. Appelbaum’s authority, and circumvent their own. However, we do note that the Town appears to lack a defined, formal procedure for employees to advance claims against of the Town Manager for defined policy violations.

14. **As an example of this concerted effort to show the employees that he and only he has the authority in the Town, at a recent meeting at which the Mayor was present, he not only gave the Mayor “the finger” to his back as the Mayor left the meeting, he stated that the Commissioners are “so stupid” that “we don’t need them” and that he can run the town without them.**

Although no testimony was provided regarding the exact date and time of the “recent meeting” in this paragraph, we were able to confirm that Mr. Appelbaum has “given the finger” to any number of individuals in Town Hall, likely including the Mayor. Mr. Appelbaum testified that he does not engage in such conduct, but rather that the Mayor has given him the finger on occasion. Chief Mackert stated that Mr. Appelbaum gave the finger to Diane Hanson; and there is evidence that Ms. Hanson gave him the finger in return. Mr. Mears stated that Mr. Appelbaum gave the finger to the Mayor. John Doe 1 stated that Mr. Appelbaum only gave the finger to the former Mayor and not to Mayor Cooke.

Regarding Mr. Appelbaum’s comments that the Commissioners were “stupid” or not needed in order to run the town, Chief Mackert claims that he heard this language in 2014 or 2015. Jane Doe 7 stated that she heard Mr. Appelbaum state that the Commissioners are not needed during a meeting on May 16, 2017. Mr. Mears stated that he heard Mr. Appelbaum make similar comments with respect to Commissioners Mauler and Persinger. Mr. Appelbaum denies making these statements.

We find it more likely than not that Mr. Appelbaum shared his negative opinions of some Commissioners (both past and present) in the office, and gave the “the finger” at one time or another.¹¹⁶ However, Mr. Appelbaum’s conduct in this regard does not demonstrate a “concerted effort to show the employees that he and only he has the authority in the Town.” No evidence demonstrates that Mr. Appelbaum is the only authority in the Town. In addition, the Town Manager is still bound by the Town Charter, the Town Code, and the State Code.

¹¹⁶ The Mayor recalls Mr. Appelbaum giving him the finger in his office at one time “with a big grin on his face.”

15. **Under the Town Charter, it is the job of the Town Commissioners to establish and vote on the budget and to adhere to the budget in making appropriations. However, after the budget is voted on and established, Mr. Appelbaum makes significant changes to it as a means of controlling and punishing employees. Mr. Appelbaum shifts funds from one department to another without seeking approval from the Commissioners. At times, this threatens public safety; however, since employees are not permitted to speak about this at Town meetings, they cannot do anything about it.**

Jane Doe 6, Jane Doe 2, and Jane Doe 9 all deny that Mr. Appelbaum alters the budget that is approved by the Commissioners.¹¹⁷ Several witnesses with personal knowledge of the budget development and management processes—including Chief Mackert—noted only that allocated funding for the restructured Parking and Code Enforcement office were moved from the police department—where those services had been located—into the Town’s administrative budget. For his part, Mr. Appelbaum denied altering any approved budget. He noted that when he proposed to relocate civil code enforcement services from the police department to the Town administration neither Chief Mackert nor the Commissioners objected. He also noted, that for the first time in 2016, he recommended a budget amendment halfway through the year to add approximately \$150,000 in expenditures as a result of the Town having a strong fiscal year. This recommendation was proposed to the Town Commissioners for approval; it was not unilaterally made by Mr. Appelbaum.

When asked for the basis of this allegation, Complainants provided generalized statements about funds being “moved,” or that their budget requests were reduced during the development process. There is no question that Mr. Appelbaum is budget conscious, and endeavors to save the Town money wherever possible. But we have not located or been provided any concrete evidence that, after a budget has been approved, any significant, unapproved, changes have been made to the budget. Without a specific example being provided, we conclude that this allegation is without merit.

¹¹⁷ We note that the Town’s budget is audited each year by an independent accounting firm. We understand that the FY 2017 budget audit was recently completed. Though the scope of this investigation does not cover the Town’s fiscal practices to a meaningful degree, there has been no indication from the audit budgets—available on the Town’s website—of any irregularities with the Town’s fiscal management practices under Mr. Appelbaum.

- 16. Mr. Appelbaum frequently dons a “Rastafarian” outfit (consisting of a Rastafarian hat, a shawl, and a bag with a marijuana leaf on it) at the office, sometimes in conjunction with pajama bottoms. This is culturally insensitive, inappropriate, and suggestive of marijuana use. Often during the work day, Mr. Appelbaum will leave the office for a very short time, giving the distinct impression he has done so for the purpose of using marijuana while at work.**

It is uncontroverted that Mr. Appelbaum at times wears a wool hat or a shawl, which some interviewees described as the “Rastafarian” outfit referenced in the Letter. Almost all persons interviewed stated that they have observed Mr. Appelbaum in odd dress. However, there is simply no basis to conclude that his manner of dress is realistically offensive, or intended to be offensive. And there is no basis to conclude that the items or manner of dress described in this allegation violate, or even implicate, a relevant standard of workplace conduct for the Town. Frankly, these particular allegations appear to be examples of personal dislike and animosity towards Mr. Appelbaum.

It is also undisputed that Mr. Appelbaum, whose personal residence is within walking distance of Town Hall, will at times leave Town Hall and return to his home during the work day. He has claimed that at times he returns to his home to take personal calls. As already discussed, Mr. Appelbaum has also been known to arrive at the office early in the morning, complete several hours of work, and return to his home to prepare for the day. Although two witnesses made vague statements about an unidentifiable smell,¹¹⁸ no witness conclusively stated that they had first-hand knowledge of Mr. Appelbaum using drugs, including marijuana. Even if Mr. Appelbaum is “sympathetic” to those who use marijuana,¹¹⁹ no testimony or documentary evidence supports the allegation that

¹¹⁸ For example, Mr. Mears states the Mr. Appelbaum “comes back with sometimes a different odor that I’ve smelled before. And you know, I don’t know whether he used [marijuana] or not. But the potential probably was there.” Jane Doe 7 stated that “[m]arijuana and incense both have a distinct odor. I have smelled that once but, like I said, it could have been incense. I don’t know.” Chief Mackert stated: “I’ve never smelled marijuana on him when he’s come back. Okay?”

¹¹⁹ Q: My question is, do you have any evidence or personal knowledge of Mr. Appelbaum using marijuana at work or off work?

A: I don’t, but he talks about it all the time insinuating that -- I wouldn’t say a marijuana smoker. He has said to me because, you know, we have had conversations about drug busts and whatnot, he has said to me that he is

Mr. Appelbaum leaves the office during the work day for the purpose of using marijuana.

- 17. Mr. Appelbaum maintains a “voodoo” doll on his desk and asks that employees who come into his office for meetings, including lifeguards, rub the doll. Employees who refuse are pressured. Many employees find this strange and humiliating and feel that they are intentionally being made to look foolish.**

The majority of witnesses who have been in in Mr. Appelbaum’s office confirmed that he keeps a “Voodoo” doll on his shelf. A Voodoo doll is an effigy that is commonly associated with the Voodoo religion, prominent in Louisiana. Mr. Appelbaum maintains a residence in New Orleans, and the doll is a souvenir from that region. Interviewees also observed that Mr. Appelbaum keeps many other, varied collectible items in his office on shelves and on his desktop. Several interviewees made specific reference to a sledgehammer, also kept in Mr. Appelbaum’s office.

Mr. Fritchman is the only witness who stated that he was personally asked to rub the Voodoo doll. He recounted a single incident where he and his lieutenants were entering Mr. Appelbaum’s office for a meeting. As Mr. Fritchman and his lieutenants proceeded into the room, each was asked to rub the Voodoo doll. Only the first person to enter Mr. Appelbaum’s office actually touched the Voodoo doll. Mr. Fritchman referred to this individual as “Rob.” According to Mr. Fritchman: “I didn’t rub it and none of the other defendants rubbed the voodoo doll.”

Several witnesses confirmed that Mr. Fritchman had recounted this incident to them. Otherwise, the interviewees testified that they either were not aware of the Voodoo doll, or were never asked to rub or touch it. Absent additional testimony demonstrating a pattern of behavior, we are unable to conclude that Mr. Appelbaum on more than one occasion asked any individual entering his office to rub the Voodoo doll. Nor can we conclude that “[m]any employees find this strange and humiliating and feel that they are intentionally being made to look foolish.”

sympathetic with marijuana users. I have never seen him use it. I have never seen him do it. I have never smelled it coming from his house.

C. RACIAL DISCRIMINATION Town Employees of color are made to feel inferior by Mr. Appelbaum, who in front of other Town employees, refers to them in derogatory fashion

18. Mr. Appelbaum refers to employees of color as “the brown people.”

Jane Doe 12, an African-American former employee of the Town, testified that Mr. Appelbaum refers to people of color as “the brown people” – it was an “ongoing thing” when she was employed there. She gave several instances where he made the reference.

The first:

One instance that stands out, we were standing at the copier, and there were several of us that were there. And he says, “Oh, I know what we are going to do. We are going to start blaming everything on the brown people.” I said okay. And when he would make these, those kind of comments, I would always say something to him. I said, “Okay. You better stop making those comments.” And he would just kind of laugh it off like it was a joke.

Another couple of instances:

And one time I said, I said, okay, that's not working that way. So I said, “Okay. One day this town is going to be paying me a lot of money if you don't stop making these comments.” He just kind of laughed like oh, yeah, right. Because that's how he would handle the situation. He did it another day. And I said -- and with Marc, you have to stand up. You have to stand up to him. He is the type of person you have to. You can't cower down. You have to stand up to him.

And another day he referred to people of color as brown people. I said, “Okay, it's going to be another \$10,000,” as I'm saying to him like, okay, stop playing. Because that's what I would say to him, “Okay, stop playing with me.”

The most descriptive incident:

And then one particular day he made the comment -- his wife was in the office, and we were standing back by his office. And he made a brown people comment again. And he really embarrassed me that day, because I didn't know her. I wasn't familiar with her. And it didn't feel real good at all. And she immediately -- she immediately said, um, she said, "Oh, he is referring to me, too. I have Spanish in my family." Or something to that effect, like she was trying to make me feel better, because she knew. Like she must have saw -- she was standing right beside me, so I know she saw the look on my face."

Jane Doe 12 states that she told then-Mayor Diane Hanson about the comments on at least two occasions. Allegedly one time was when the Mayor had come to Town Hall for a meeting with Marc, about a day or two after he had made the comment in front of his wife. Jane Doe 12, the Mayor, and Mr. Appelbaum were standing in the front office. Jane Doe 12 said, "Mayor Hanson, did you hear about the new policy Marc is putting in place?" The Mayor looked confused and said that she had not. Jane Doe 12 said, "We are going to start blaming everything on the brown people." Apparently the Mayor looked "horrified" and about two minutes later, Mr. Appelbaum came back to Jane Doe 12 and told her, "You tried to get me in trouble, didn't you?"

Jane Doe 12 states that the second occasion was during her exit interview with Commissioner Hanson when she was the Town Mayor. Although Commissioner Hanson denies that such an exit interview happened (or any meeting or discussion about why Jane Doe 12 was leaving the Town, or about Mr. Appelbaum's conduct), Chief Mackert testified that he spoke with Jane Doe 12 both prior to and after her exit interview. According to Jane Doe 12, during the interview, she told Mayor Hanson about the "brown people" comments. No follow-up was done to her knowledge.

Jane Doe 12 testified that she also told Mr. Appelbaum the comments were not welcome. She said that his response was that he picks on everyone, including himself, and that he finds people "are just so sensitive today." She said that she told him that she really needed him to stop with the brown people jokes, and that he agreed to and stopped.

Jane Doe 10 confirmed that she has heard Mr. Appelbaum use the phrase "the brown people" when Jane Doe 12 was present. Jane Doe 7 claims she has heard him use the phrase as she passed in the hallways, although Jane Doe 7 was

not working [REDACTED] while Jane Doe 12 was employed with the Town.

We conclude that Jane Doe 12's testimony is credible, and that Mr. Appelbaum used the phrase "the brown people" on at least one occasion in front of his wife, likely used the phrase on other occasions as corroborated by Jane Doe 10. These instances occurred during Jane Doe 12's employment, which we understand ended sometime in 2013. No investigation appears to have been made into this allegation when (or if) it was contemporaneously raised to the Mayor.

19. Mr. Appelbaum treats employees of color as inferior and discriminates against them based upon their race.

Four employees have been identified as "employees of color": Jane Doe 12, Jane Doe 11, John Doe 13, and Jane Doe 4, who is identified as Asian. We understand that there are other part time or seasonal employees of color who were not interviewed. Jane Doe 12 became very emotional during her interview when she related a story Mr. Appelbaum had shared with her about 20-30 African-American employees who used to work for him, and how he had said that they were "some of the dumbest people that he ever worked with." Jane Doe 11 similarly shared that Mr. Appelbaum no longer talks to her but when he did, he would talk to her like she "didn't understand, like he had to really take his time and explain things, like [her] brain was a little small." Jane Doe 11 also said that she has witnessed Mr. Appelbaum being "very careful" in how he interacts with John Doe 13.

John Doe 13 denied that Mr. Appelbaum has ever said an unkind word to him, was ever rude to him, had ever tried to intimidate him, or otherwise ever talked down to him. Jane Doe 4 denied experiencing or witnessing Mr. Appelbaum's racial discrimination against her or against any other employee.

A few members of the police force – John Doe 7, Chief Mackert, and John Doe 12 – stated that Mr. Appelbaum would refer to the people who patronized Northbeach (a bar in Dewey Beach) as "those people" or as people who needed to be gotten rid of. They inferred from their separate conversations that he was referring to African-Americans as "those people."

We find that there is some evidence that has Mr. Appelbaum interacted with some minority employees in different manner than with other employees. However, we were unable to conclude that Mr. Appelbaum's conduct factually amounted to intentional discrimination, or had a demonstrable disparate impact in

violation of the DDEA, Title VII, or other federal law. Nevertheless, based on the conduct we have corroborated, his conduct is unacceptable, cannot be condoned, and could very well have resulted in liability under state and federal law if contemporaneous charges had been advanced to the Delaware Department of Labor, and/or the United States Equal Employment Opportunity Commission. At the very least his actions and statements could have been construed as harassing and creating a hostile work environment—which is actionable. Moreover, even if there was no demonstrable impact on a quantifiable term or condition of employment, such as an employee’s compensation, creating a hostile work environment because of an employee’s race can be determined to be an impact on the terms and conditions of their employment, and can be discrimination within the meaning of the law. This was serious conduct, and our findings and recommendations reflect this.

20. Mr. Appelbaum talks down to employees of color with an aggressive and derisive tone, in an effort to make them subservient

While Jane Doe 11 has stated that she believes Mr. Appelbaum “talks down” to her, John Doe 13 and Jane Doe 4 do not feel this way. Jane Doe 4 said that Mr. Appelbaum speaks to everyone with an aggressive or derisive tone, and that she did not feel uncomfortable as a result because she was Asian, but rather more in a general sense. John Doe 4 testified about a meeting that he had with Mr. Appelbaum and Jane Doe 11 concerning Jane Doe 11’s recent pay increase.¹²⁰ John Doe 4 said that Mr. Appelbaum would not look at Jane Doe 11, even when he was speaking to her, although he did not know if this was because of her race, her sex, or something else. In all, there is insufficient evidence that Mr. Appelbaum speaks with aggression or a derisive tone toward employees of color, although we note that there may be some credence to Jane Doe 11’s statement that he “talks down” to her. Standing alone, this specific incident is likely insufficient to constitute actionable race discrimination. However, we would be remiss to not add

¹²⁰ Mr. Appelbaum challenged both Jane Doe 11’s and John Doe 5’s recent pay increases, which were the result of the annual across-the-board increases that Chief Mackert proposes for all regular Police Department employees. Mr. Appelbaum stated he wanted to determine whether pay increases for the administrative employees were warranted; he does not approve of general across-the-board raises, believing that pay increases should be tied to individual performance. Mr. Appelbaum met with John Doe 4 and Jane Doe 11 during the period that John Doe 4 was serving as the Acting Chief of Police, and then approved the raise. Mr. Appelbaum subsequently informed John Doe 4 that he could authorize John Doe 5’s raise if John Doe 4 believed it was warranted. John Doe 4 approved raises for both employees.

as a cautionary note that if this incident had been taken in the aggregate with other conduct, it is certainly possibly that it could have been considered as an element of an actionable claim of discrimination or harassment, depending on other factors.

D. IMPROPER INTERFERENCE WITH TOWN LAW ENFORCEMENT: Mr. Appelbaum uses his position as Town Manager to interfere with the workings of the police department

21. Mr. Appelbaum goes around the chain of command at the police department, interfering with discipline, creating an unprofessional environment and jeopardizing public safety. It is essential to order and safety that police officers understand who they report to (the Chief) and that the chain of command is followed.

The claim that Mr. Appelbaum interferes with discipline is based primarily on a single, recent event, according to both Chief Mackert and John Doe 4.¹²¹ On April 15, 2017, an officer¹²² reported that his Town-issued duty weapon, several loaded magazines, his utility belt and equipment (including a TASER) were stolen from his unmarked police vehicle, while it was parked overnight in front of his girlfriend's house.¹²³ The theft was reported to the State Police, Chief Mackert and

¹²¹ Chief Mackert described a second incident that he recalls from 2013 or 2014, involving a Town police officer who was accused of sexually harassing a Town police dispatcher. John Doe 4 conducted an investigation, and the officer tendered his resignation. Mackert, who valued and respected the officer's long service, offered the officer the option of resigning immediately and cashing out his accrued payable benefits in a lump sum payment, or to separate from the workplace but remain in an active employee status, using his accrued sick and vacation leave in order to accrue additional service credits towards his retirement. The officer exercised the option to transition to "terminal leave" status, and stayed on the Police Department's payroll until his leave was exhausted. Chief Mackert did not consult with Mr. Appelbaum about handling the matter. When Mr. Appelbaum was informed, he questioned Chief Mackert's decisions, and directed the Chief to consult with him prior to taking any similar action in the future; Mr. Appelbaum did not agree that the officer should have been allowed to stay on the payroll. Chief Mackert was upset by Mr. Appelbaum's questions and directive, believing that he handled the situation appropriately for an officer ending a 30-year career.

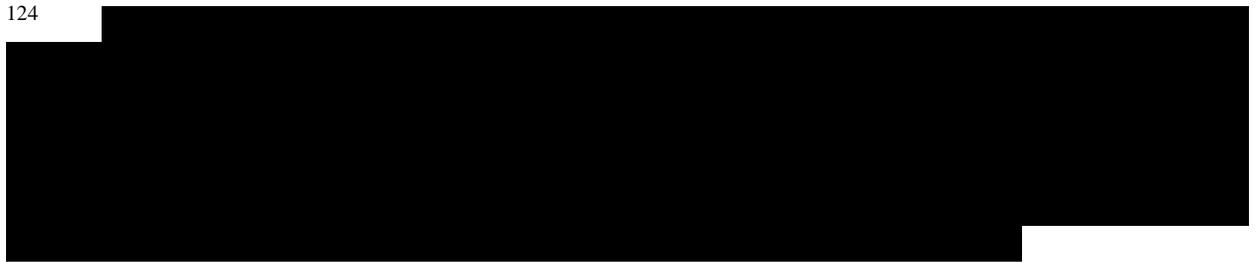
¹²² The officer's name and several details about the theft are being withheld out of an abundance of caution to maintain the rights and protections provided by Title 11 Delaware Code, Chapter 92 (The Delaware Law Enforcement Officers Bill of Rights; "LEOBOR").

¹²³ The vehicle was later determined to be unlocked.

John Doe 4. John Doe 4 initiated an internal affairs investigation¹²⁴ when he returned from vacation approximately one week after the theft, and the State Police investigated the theft. That investigation led to the relatively quick recovery of all of the stolen items, except for the weapon and the ammunition. To date, the weapon and ammunition remain unrecovered.¹²⁵

Chief Mackert notified Mayor Cooke about the incident, who directed the Chief to notify Mr. Appelbaum. Summarizing their discussions and interactions over the course of several weeks, Mr. Appelbaum wanted to be informed about the details of the theft as they were determined; he had significant concerns about the loss of a Town weapon and potential repercussions, and wanted to be kept updated on the status of the investigations. Chief Mackert was troubled by Mr. Appelbaum's requests for information about the progress of the internal investigation, and the request that he should consult with Mr. Appelbaum before proposing discipline for the officer. The Chief was also troubled when Mr. Appelbaum directed him to place the officer on internal administrative "modified" duties pending the internal investigation, rather than a paid suspension which the Chief had planned. And, the Chief was troubled by a directive to not issue the officer another duty weapon.¹²⁶ These factors were also the source of John Doe 4's concerns, based on his belief that a Town Manager has no authority to request or receive details on an internal affairs investigation, and no authority to be involved in any manner with disciplining a police officer.¹²⁷ John Doe 4 was also troubled

124



¹²⁵ Mr. Appelbaum testified that he was informed the weapon had been traded for heroin.

¹²⁶ This prohibition may have been directed by the department's attorney, John Brady, Esq., who Chief Mackert consulted following the theft. Chief Mackert could not recall whether both Mr. Brady and Mr. Appelbaum directed that the officer not be issued another weapon, or whether only one of them made the request.

¹²⁷ Chief Mackert and John Doe 4 provided different reasons for their belief that the Town Manager should be restricted from involvement with an investigation and discipline of police personnel, including: the belief that the Town Manager will hear police officer disciplinary appeals (Mackert); because the Town Manger should be excluded based on standards in the Law Enforcement Officers' Bill Of Rights (Mackert and John Doe 4); or, as a basic matter of their belief in the separation-of-powers that should be maintained between the Police Department and

by the officer's restriction from carrying a duty weapon and assignment to administrative duties, believing these steps were inappropriate and disparaging to the officer.

When the internal affairs investigation was completed, John Doe 4 concluded that the officer violated departmental policies and recommended that the officer be disciplined. However, John Doe 4 believes that the officer has not served any discipline because he would have been informed if the discipline was imposed, and would have processed relevant paperwork into the officer's personnel file; while Chief Mackert believes that the officer has accepted discipline and is serving a six-month disciplinary process. Chief Mackert did not describe what type of discipline was imposed, or why it is extending over a period of six months.¹²⁸ He did state that he did not tell Mr. Appelbaum what type of discipline was imposed—in part because the investigation of the complaints in the June 14th Letter have interrupted normal operations and communications—and that Mr. Appelbaum did not direct him to impose any particular discipline on the officer, although Mr. Appelbaum believed that the officer's action were serious and warranted a significant penalty.¹²⁹ Chief Mackert also testified that he resisted a request by Mr. Appelbaum to restrict the officer from training the Town's seasonal police officers in the weeks immediately following the theft, based on his belief that the officer was the best prepared and best available resource for training the seasonal officers.

From Chief Mackert's, John Doe 4's, and the officer's own testimony, it is clear that the officer was never separated from service, was returned to full duty in the span of several weeks, and has retained the new duty weapon that was issued to

Town administration (Mackert and John Doe 4). Neither the Chief nor John Doe 4 could recall any similar serious incident for comparison with Mr. Appelbaum's involvement with the firearm theft. Notably, no specific grievance procedure has been identified that places the Town Manager in an appellate role for police personnel discipline.

¹²⁸ The officer testified that he has to check his Town-issued duty weapon in and out from the police station for six months, and that he "signed off" on two policy violations.

¹²⁹ Mr. Appelbaum did not prohibit the officer's return to full duty, and has not taken any other actions with respect to the investigation or the officer's duty status. It is worth noting that during the investigation period, a proposal was made through the Commissioners to engage a private law enforcement consultant to evaluate the Police Department's policies and practices as a result of the theft. Though he opposes this recommendation, Chief Mackert has made preliminary contact with the consultant as directed, however there have been no efforts to begin the evaluation following the submission of the June 14th Letter.

him three or four weeks after the theft.¹³⁰ Chief Mackert's and John Doe 4's chief complaints about Mr. Appelbaum are that he should never be involved in any manner in a police department internal affairs matter, and that he directed Chief Mackert to not suspend the officer with pay pending an investigation, instead placing him on modified duty with pay. However, there is no clear basis to maintain that the Town Manager has no technical right to be involved with an event as significant as the theft of a Town-issued police officer's duty weapon; nor is there a clear technical basis for the position that a Town Manager has no authority to consult on disciplinary matters with respect to the Town's police personnel.

To the extent that Chief Mackert and John Doe 4 cite to the LEOBOR statute in general, there is no prohibition to be found therein for Mr. Appelbaum's actions. Their belief that LEOBOR requires such a broad umbrella of restrictions on a public employer's top administrative officer is misplaced. Similarly, even if the Dewey Beach Town Manager serves in an appellate role in a grievance procedure that could have been applied in this situation—though such a procedure was not described with any specificity—there is no statutory or other codified limitation on a principal administrative officer being involved—at least to some degree—with disciplinary matters, but nonetheless retaining an appellate role. In fact, this type of “layered” involvement is the norm in public sector governance. The critical factor is that a hearing before the Town Manager is not the last stage in a grievance process under the Town Charter or Town Code.

With regard to the belief that as a matter of separation of powers Mr. Appelbaum should not have involved himself in the investigation of the stolen firearm and the officer's status, that is at best an opinion based of preference and perception, not legal doctrine. The Town Charter provides that the Town's Chief of Police reports to the Town Manager. This is not to suggest that the Town Manager has unfettered authority to direct police department personnel and

¹³⁰ Chief Mackert testified that he consulted with John Doe 4, and they decided to reissue a duty weapon to the officer so that he could be in full uniform as an active duty officer for a premium pay job at the Cape Henlopen High School prom (they believed that denying him this work opportunity would have been unjustifiably punitive), and so that he could defend himself should a prisoner who escaped from custody in Maryland return to Delaware to exact some type of revenge on the officer. The escaped prisoner was incarcerated for several crimes, including firing several shots into the officer's house, among others. The officer himself believed that the act was random and not directed at him personally, and there was no testimony that the officer told either Chief Mackert or John Doe 4 that he believed he was in personal danger from the escaped prisoner.

activities, but it does indicate that the Town Manager has a role in the management of police personnel—including discipline—rather than no role whatsoever. To the extent that current Department leadership believes there should be a better delineated separation, or an exclusive separation, that is a matter of policy reserved to the Town Commissioners.

22. Mr. Appelbaum attempts to pressure police officers and law enforcement staff to give him police reports, which by state law cannot be given to him. This situation became so untenable that the Delaware Criminal Justice Information System official had to intervene and tell Mr. Appelbaum directly that this conduct is illegal.

There has been extensive discussion and debate between Department leadership and Mr. Appelbaum over several years about what type of law enforcement reports may and may not be given to the Town Manager. However, despite testimony covering several examples of information and report requests made by Mr. Appelbaum—or other administrative employees—there is no evidence that any information which leadership believed must be kept confidential was actually provided to Mr. Appelbaum.¹³¹ And, both Chief Mackert and John Doe 4 testified that Mr. Appelbaum did not take any steps to force them to provide such information. The legitimacy of the requests may be debatable in their view, but there was no demonstration that a Town Manager may not or should not ask for at least some types of law-enforcement related information. Nor was there any corroboration of the claim that a Delaware Judicial Information System (DELJIS) official had to “intervene” because Mr. Appelbaum’s conduct was “illegal.” Based on testimony from both Chief Mackert and John Doe 4, there was no occurrence that resembled this allegation.

¹³¹ We, however, note that Jane Doe 8 asserted that she gave Mr. Appelbaum a parking ticket requested on at least one occasion.

- 23. The Chief of Police has been in his position for over 25 years and has extensive, specialized professional training for his position. Similarly, all full-time Town police officers have attended police academy and received multiple certifications relevant to law enforcement. This training informs the appropriate manner of responding to a situation and interacting with members of the public. Mr. Appelbaum has no such training but constantly involves himself in police procedures. Mr. Appelbaum is not qualified to determine police procedure and matters of public safety.**

Despite ample testimony about the many instances that Mr. Appelbaum has requested the Town's police department leadership to engage in specific enforcement efforts, has requested information, or questioned leadership about enforcement practices and policies, there is no evidence or defined standard that a Town Manager is expressly forbidden from being involved with the department's operations and procedures. No example was provided to demonstrate that Mr. Appelbaum directed a change in law enforcement procedure or practice that was contrary to law, or that department leadership made any change despite their belief that the action was contrary to law or good policing standards. To the contrary, Chief Mackert and John Doe 4 consistently testified that when Mr. Appelbaum requested or inquired into enforcement or jurisdictional matters with which they disagreed, they would regularly tell him they thought he was wrong, or otherwise refused to comply—with no negative consequences.

We fully appreciate leadership's comments on Mr. Appelbaum's comparative lack of law enforcement experience, and the propriety of his being directly involved with law enforcement issues and efforts. But, there is no standard requiring a strict hands-off approach. And, the fact that Mr. Appelbaum is not—as he will readily admit—a trained or experienced law enforcement professional, does not inherently mean that he, as the Town Manager, has no role to play with maintaining public safety. While it may be an unpalatable answer given the present circumstances, department leadership, the Town Manager and the Town Commissioners will be best served by maintaining an ongoing dialogue about the Town's public safety needs, and the role of the Town Manager in overseeing and supporting law enforcement operations. Further, it would be prudent for the Town to review the propriety of allowing the police department to maintain its historically completely autonomous process of administering the

federal surplus equipment program, and all aspects of officer accountability and discipline.

- 24. Mr. Appelbaum routinely attempts to interfere with the professional independence of police officers, among other things, by directing them to take enforcement actions against selective individuals and businesses. This violates not only the Town Charter but also the Delaware Code, which is designed to preserve the independence of law enforcement. This conduct sets a poor example for young officers who are new to the job and are led to believe that the law may be enforced selectively rather than uniformly.**

The claim that Mr. Appelbaum interferes with the police department's "professional independence" is based on an aggregation of events that Mr. Appelbaum has been involved with during his term, such as citizen complaints, various Town Code enforcement efforts, enforcement efforts against Town business entities, and directly engaging with police personnel—such as the public information officer. Chief Mackert and John Doe 4 view these actions as unprecedented attempts by Mr. Appelbaum to intercede with department operations on matters for which the position of Town Manager has no authority, or, conversely, for which the department itself should not be involved. Examples provided by Chief Mackert and John Doe 4 include Mr. Appelbaum's requests to be kept informed about, or requesting that the department initiate enforcement action on matters involving criminal code enforcement, alcohol service, underage drinking, occupancy limits, noise limits, theft, and other potentially criminal or public nuisance matters. Their view is that the Town Manager is not a law enforcement officer, and has no authority or proper administrative purpose for either directing, or questioning the department's law enforcement practices; and, in the alternative, that Mr. Appelbaum would insist that the department initiate enforcement action in areas for which it had no lawful authority.

Department leadership believes that Mr. Appelbaum has improperly directed law enforcement personnel to be involved with matters outside of their jurisdiction with respect to internal Town operations. One example described by John Doe 4 was his being asked by Mr. Appelbaum in July 2016 to sign a letter to certain Town residents, drafted by the Town administration, stating that those who had concerns about a dispute with a neighbor should contact John Doe 4 so that the Town could better understand the nature of the issue and what steps the Town could take to resolve the matter. According to John Doe 4, Mr. Appelbaum

believed that the communication would have more “weight” if it came from the police department. In the Lieutenant’s view, the police department should not have been involved whatsoever in this type of matter since no criminal activity had been alleged. Rather, it was a matter for the Town administration to handle, and “interjecting” the police department was improper, and a misuse of the Town’s law enforcement resources. Ultimately, John Doe 4 signed the Letter because he believed that if he did not, Mr. Appelbaum would retaliate against him, specifically to the effect of impeding his selection as the next Chief of Police; a position to which he aspires.

As with the issues relevant to paragraphs 22-23 of the Letter, we appreciate the perspective—and the very real frustration—that leadership has towards Mr. Appelbaum’s approach. It seems abundantly clear that he has taken a far more direct and active role with the police department and its enforcement efforts than prior Town Managers. However, there is no evidence to conclude that his involvement and requests—in general—violate any particular law, code, ordinance or the Town Charter. Again, the complaints here implicate matters of Town policy, which are best left to the Town Commissioners for review and direction.

- 25. When the Chief of Police was recently out on sick leave, Mr. Appelbaum approached individual officers and suggested that the officers should assist him in forcing the Chief out of his position. He stated that he “did not trust the Chief.” As an inducement to help him oust the Chief, Mr. Appelbaum suggested that one of the officers could replace the Chief. Witnesses have heard Mr. Appelbaum state that the Chief “is not fit for the job.” This effort to undermine the Chief of Police with his officers not only violates the Chiefs due process rights under Chapter 93, Section 9301, but also jeopardized public safety by undermining the Chiefs authority—a crucial element in maintaining order and discipline within the department.**

The claim that Mr. Appelbaum sought assistance from the Town’s police officers to “assist him with forcing” Chief Mackert out of his position could not be corroborated. The claim that Mr. Appelbaum does not trust Chief Mackert was made by John Doe 4, who testified that Mr. Appelbaum told him that he (Appelbaum) doesn’t trust Chief Mackert, doesn’t trust that the Chief “tells [him] everything,” and that “Sam and I don’t see things the same way.” There was no testimony that Mr. Appelbaum made these or similar statements to anyone but

John Doe 4. John Doe 4 also testified that he and Mr. Appelbaum discussed John Doe 4's interest in becoming the next Dewey Beach Police Chief but there was no discussion or suggestion that the Lieutenant should aid with the ouster of Chief Mackert as an inducement for becoming the next Chief. In sum, no meaningful factual claims could be corroborated. And, there was no demonstration that the Town's safety was in any way jeopardized as claimed, or that Title 11, Chapter 93 (Police Chief Due Process) is implicated in any way.

26. Mr. Appelbaum consistently pressures the Police Chief (and the building inspector) to violate State law by interfering with matters that are within the exclusive purview of State agencies, including the State Fire Marshall and the Alcohol Beverage Control Commission. When they refuse, Mr. Appelbaum becomes visibly angry.

The basis of this complaint is Mr. Appelbaum's continued insistence that the police department be more aggressive with regulating the operations of establishments in Dewey Beach, primarily bars. He has asked the department to regulate occupancy limits, and alcohol "over service" standards (denying service to inebriated patrons), and noise ordinances. In particular, Mr. Appelbaum has focused on Dewey businesses such as the Northbeach and Rusty Rudder restaurants.¹³²

Northbeach in particular was a noted trouble spot for the town during a period when it ran "dollar beer night" on Tuesdays. Significant crowds of often very intoxicated patrons would gather, and considerable public disturbance was the usual result. Mr. Appelbaum took a lead role in securing enforcement resources and "policing" this establishment, including working with the police department to assign patrols at certain times, requesting that the police department liaise with the Delaware Division of Alcohol and Tobacco Enforcement ("DATE") to check identifications, secure additional enforcement from the Delaware State Police, and secure lighting in the parking lot. These enforcement efforts proved successful.

Department leadership objects, however, to Mr. Appelbaum's continuing focus on similar efforts at other establishments, or at Northbeach itself, particularly his requests that it enforce occupancy standards and alcohol service standards. Essentially, leadership is correct that DATE and the State Fire Marshall have jurisdiction over these particular areas of regulation and law enforcement.

¹³² These businesses are owned / operated by Mr. Alex Pires.

However, despite numerous examples provided in testimony, describing Mr. Appelbaum's request to meet with DATE and State Fire Marshall officials to increase their enforcement efforts in Dewey Beach, or to exhort the police department to take a more active role, every indication is that when he was told the department lacked the authority to enforce specific codes or law, he did not direct or insist that the Town's officers to violate the law. Ultimately, it is hard to find fault with the Town Manager's interest and efforts to support public safety, and the quality of life for Dewey Beach residents and visitors. And, it does not violate any law or code to explore the Town's jurisdictional authority, as well as its means and methods, for enforcing public safety laws governing alcohol and occupancy. As a matter of principle, such enforcement initiatives are envisioned by the Town Charter, which provides in Section 19(a):

The Town Commissioners may, in their discretion, establish a police force, make rules and regulations as may be necessary for the organization, government and control of a Police Force. They shall preserve peace and order, and *shall compel obedience within the Town limits to the ordinances of the Town and the Laws of the State of Delaware*. They shall have such other duties as the Town Commission shall from time to time prescribe. *The police force shall be subject to the direction of the Town Manager acting on behalf of the Town Commissioners.* (70 Del. Laws, c. 191, 7/10/1995) (emphasis added)

27. As a result of Mr. Appelbaum's continued efforts to direct and interfere with law enforcement operations, outside law enforcement (including the State Police) constantly question the Town's policies.

This claim is primarily a complaint that Mr. Appelbaum has prohibited the Town's law enforcement officers from accepting overtime "pay jobs" from certain Town business, primarily establishments that serve alcohol. A "pay job" is an off-duty or extra-duty assignment offered to a police officer, at premium overtime pay rates, for services needed by private interests, such as traffic control, crowd control, or other security measures. Officers are hired to be present in uniform, fully equipped (duty weapon, vehicle, radios, etc.), and are exclusively "on duty" for that venue. Often an event permit will require a certain number of police officers, and it is typical for local law enforcement agencies to provide their personnel for local events, though law enforcement officers may accept such jobs outside of their normal jurisdictions. Mr. Appelbaum has forbidden the Town's officers from being hired by local bars based on his belief that it is inappropriate

for a police officer to be paid by a business that the officer is normally expected to regulate. Chief Mackert (and the other law enforcement personnel) object to this prohibition, believing that it is degrading, is an insult to the officers' professional integrity and their dedication to the Town, and unfairly denies the officers income. The Chief testified that Mr. Appelbaum has refused to reconsider his position.

As justified as Chief Mackert's position may (or may not) be, the essence of the complaint is that he was contacted by a representative of the State Police who questioned why local Dewey Beach pay jobs were offered to the State Police, rather than the Town's officers. The State Police representative did not want to "step on any toes" by taking the jobs. This is the basis of the claim that the State Police has questioned the Town's policies.

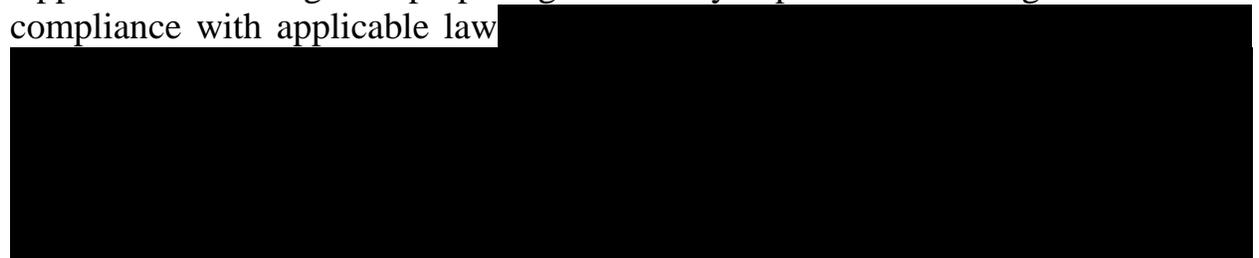
The police department's frustration with the change in their practice of servicing all of pay jobs in Dewey Beach may be understandable. Though the practice is somewhat beyond the scope of this investigation, the investigators recognize that it is normal and customary for police department personnel to be authorized to accept extra-duty pay jobs. However, each law enforcement agency its governing body establishes regulations for their officers to work pay jobs. In this case, the Town's officers are objecting to a policy decision and restriction imposed by the Town Manager. But, there is no basis in the Town Charter, Code or state law to suggest that the Town Manager has no authority to implement the restriction. It is therefore not a legally actionable matter, though it may be policy consideration for the Town Commissioners to consider.

E. JEOPARDIZING PUBLIC SAFETY BY IMPROPER INTERFERENCE WITH DEWEY BEACH PATROL: Dewey beach patrol is recognized as an Advanced Lifeguard Certified Agency by the United States Lifesaving Association. Dewey's well-trained, professional lifeguards are important to the families that visit Dewey and play an important role in public safety. Mr. Appelbaum's continuing efforts to undermine the structure and functioning of DBP is a threat to the safety of beachgoers in our community and appear to violate the Town Charter, pursuant to which DBP reports to the Commission, and not the Town Manager.

While it is true that well-trained, professional lifeguards are important to the families that visit Dewey and play an important role in public safety, there is no evidence that Mr. Appelbaum has attempted to undermine the structure and

functioning of the lifeguard program, or has threatened the safety of beachgoers. At the heart of this claim is an ongoing dispute between Mr. Appelbaum and Mr. Fritchman regarding lifeguard staffing. For his part, Mr. Appelbaum believes that the lifeguards can be staffed more efficiently, and, as part of the budgeting process, has created a staffing matrix to demonstrate how he believes that the lifeguard staffing should be allocated. Mr. Fritchman, however, strenuously opposes any change to his own staffing model, and does not believe that the Town Manager should be involved with staffing decisions for the lifeguards. While the two disagree, the record is clear – the Town Manager has not dictated that his staffing model be implemented. Instead, even though he disagrees with the staffing method employed, the Town Manager has left lifeguard staffing decisions to Mr. Fritchman. And, even though the Town Manager believes that the lifeguard program could be run more efficiently and cheaply, he provided the DBP virtually all of the budget allocation that it requested (over \$340,000).

Claims that the Town Manager undermines the structure and functioning of the DBP are unfounded. At bottom, this claim relates to Town Manager Appelbaum making or proposing necessary operational changes to ensure compliance with applicable law



In addition, Mr. Fritchman does not like additional paperwork, and recordkeeping requirements that have been imposed by Town staff to assure that human resources records are accurate and compliant. And, he does not like that he is required to check with the Town Manager or the Town's HR consultant before he suspends or fires a lifeguard employee.¹³³ Establishing sound human resource recordkeeping, timekeeping, and reporting requirements does not upset the structure and functioning of the DBP, but rather, is a sound protection against potential employee claims for wage and hour, or other employment law violations.

Mr. Fritchman is very resistant to oversight by the Town Manager, and believes that changes suggested by the Town Manager are unnecessary, burdensome, or otherwise interfere with his management and control of the

¹³³ See REP 80.

lifeguards.¹³⁴ We believe that Sections 16(c), (f), and (g) of the Town Charter are clear: the Town Manager is required to supervise all aspects of Town administration, and all work related thereto, and to keep a strict accounting of all the Town's expenditures. We do not believe that a reviewing Court would conclude that the DBP is exempt from the Town Manager's supervision, particularly given that the police force is expressly assigned to the Town Manager's supervision (Section 19(a)), and the DBP is deemed to be an auxiliary of the police force (Section 19(b)). There is no support for the claim that the DBP is exempt from the Town Manager's supervision. Consequently, while Mr. Fritchman is personally resistant to oversight by the Town Manager, such oversight is required by the Town Charter.¹³⁵ Nor is there any merit to the claim that Mr. Appelbaum's actions are a "threat to the safety of beachgoers in our community." We find that no policy implemented or suggested by Mr. Appelbaum has endangered beachgoers in Dewey Beach. In fact, some of his policies, including extension of the lifeguard season, and having a night patrol, appear to enhance the safety of the beach-going public, rather than hampering public safety.

¹³⁴ Prior to the summer beach season, Mr. Appelbaum made a list of initiatives for the Beach Patrol. Those programs were apparently agreed to by Mr. Fritchman in May. By his own admission, Mr. Fritchman does not like follow up on these items by Town staff.

¹³⁵ Mr. Fritchman has a laundry list of disagreements with Mr. Appelbaum, including, but not limited to: (1) extending of the lifeguard season; (2) the night shift; (3) follow-up on action items; (4) involvement with a beach death; (5) not being invited to staff meetings; (6) questions about topless bathing; (7) speaking with beach lieutenants; (8) having HR review of suspensions or firings; (9) not having purchase orders approved prior to the budget year; and (10) not being invited to present a yearly oral report of beach patrol activities in the fall. While Mr. Fritchman does not like this supervision by the Town Manager, none of these complaints endanger the safety of the public.

- 28. Mr. Appelbaum, who has no training in open water rescue, emergency medical services, or any other essential skill for lifeguarding, insists on interfering with the decisions of the Captain of the Dewey beach patrol, including scheduling and staffing of the lifeguards. The Captain of DBP, who has multiple certifications and extensive training, makes staffing decisions based upon public safety; these decisions are routinely overturned by Mr. Appelbaum without explanation. Mr. Appelbaum's decisions are made without regard to the safety standards applicable to open water lifeguarding.**

There is no basis to support this contention. Mr. Fritchman freely admits that he, and he alone, makes the staffing decisions for the lifeguards. He did not provide a single specific instance where Mr. Appelbaum made or overturned any decision of the Captain of the lifeguards. Rather, Mr. Fritchman's complaints related to more operational or budgetary issues. Mr. Fritchman's own testimony makes clear that he makes the lifeguard staffing decisions.

Q: Here is my question. When it comes to who sets the folks in the chairs come the season when the lifeguard chairs are met¹³⁶ [sic], is that your decision?

A: Yes.

Q: And even though Mr. Appelbaum provided many different staffing models, as we have just discussed, does it still remain to be your decision this year or did he mandate otherwise?

A: It still was my decision because, as per our code, I'm responsible for all the safety on the beach. So, I have made decisions based on safety, crowd numbers, weather and environmental conditions. We did, however, post this next to our scheduling that's on our wall, our calendar, our scheduling. We did post this and we do look at it to try to stick to that as close as we possibly can. But, again, it's very similar because it's a model of what we had done historically.

¹³⁶ The transcript should read "set."

Later on, Mr. Fritchman further clarified that he makes the staffing decision and such decisions are not controlled by Mr. Appelbaum. The text below is testimony provided by Mr. Fritchman after conclusion of budget discussions with Mr. Appelbaum:

Q: And what was the end result of those discussions?

A: The end result was that I told him that we would meet that obligation and we would provide guards on the days that he has indicated that we have guards, but the staffing units and the way that we set that up were based on our professional judgment.

Q: Did he dispute that or fight with you about that?

A: Yes, always.

Q: Tell me how.

A: So, the response is, I don't agree with you, and I don't agree with anything you say, but I'm going to listen to what you say and I'm going to let you run the Beach Patrol, but I don't agree with you. That's the typical response.

Q: So, he doesn't agree but he's going to let you do it your way?

A: That's right.

29. For Memorial Day weekend 2017, the busiest, most populous weekend of the year in Dewey, 31 lifeguards were scheduled to work the weekend. Mr. Appelbaum directed the number of lifeguards be reduced to 8. When the Captain of DBP refused, a shouting match ensued, during which the Captain was berated and humiliated.

At the threshold, there is no evidence whatsoever that Mr. Appelbaum ever contended that the number of lifeguards should be reduced to eight on Memorial Day weekend – May 27, 28 and 29, 2017. Payroll records confirm that more than 30 lifeguards worked on these days, and the budgeted allocation was for

approximately 30 lifeguards.¹³⁷ Mr. Fritchman does not contend otherwise. He, however, contends that for May 30th and 31st—the Tuesday and Wednesday *following* Memorial day weekend—that his budget was reduced to a budget for eight lifeguards. Mr. Fritchman stated that Tuesday, May 30 and Wednesday May 31, are part of Memorial Day weekend.

Mr. Fritchman is correct that the initial budget worksheet for May 30 and May 31 allocate only \$860.80, which is much less than the \$2,649.65 budget allocation for Saturday and Sunday or Memorial Day weekend. There is, however, no contemporaneous documentation that supports any objection to the budget allocation proposed for these two days by Mr. Appelbaum. Indeed, when Fritchman provided comments to the budget allocation, he only raised the proposed budgeted amount for those days to \$908.80. If there were a true dispute about the number of lifeguards to be deployed on May 30th and May 31st, it is logical to believe that Mr. Fritchman would have sought a budget allocation in excess of \$2,000 for each of these days, but he failed to do so.

Other testimony refutes this allegation. Mr. Appelbaum testified that he has never directed Mr. Fritchman to reduce any number of assigned lifeguards—which has not been refuted—and both Mr. Appelbaum and Mayor Cooke testified that, during the budget development process, it was clarified that the budget allocations for each day represented a *minimum* number of lifeguards on duty on a particular day. If Mr. Fritchman wanted *more* lifeguards, he was free to add lifeguards as he saw fit.¹³⁸

Another confirmation that Mr. Appelbaum never directed that the number of lifeguards for Memorial Day be reduced to eight is confirmed by the testimony of both Mr. Appelbaum and Mr. Fritchman. Clearly, in his budget models, Appelbaum believed that from a staffing model and budget perspective, the lifeguards could be staffed more efficiently. Without question, Mr. Fritchman did not believe that the staffing model proposed by Appelbaum would work or could be implemented. As confirmed by Mr. Fritchman, throughout this dispute, while Mr. Appelbaum disagreed with Mr. Fritchman, he did not impose his staffing model on Mr. Fritchman's lifeguard operations. Mr. Fritchman's own statement makes this clear:

Q: Okay. Was Mr. Appelbaum's staffing matrix ever implemented?

¹³⁷ See REP 69, 74.

¹³⁸ Timesheets for lifeguards on Memorial Day weekend are provided in REP 76-78.

A: Never.

Q: Was it dictated to you that you had to follow it?

A: It was dictated to me that I had to follow it, but at the same time, he said, I'm not trying to interfere with how you run the Beach Patrol, but this is how I want it run.

Q: What was the end result?

A: The end result is that we do as always, the end result is right here. That's the end result.

Q: Let the record reflect that Mr. Fritchman is pointing to the document marked Fritchman Six.¹³⁹

A: That's correct. So, the end result, this shows you staffing that we had on that particular day, not what was on there.

Thus, by Fritchman's own statement, Appelbaum never ultimately directed Fritchman to use any particular staffing model on any given day ever. This fact was confirmed by Mr. Appelbaum's statement:

Q: Ultimately, was it Mr. Fritchman's determination or your determination as to how many lifeguards are on the beach on a given day?

A: It would be Mr. Fritchman's.

Q: And was it his ultimate authority to deviate from the budgeting model if he felt necessary?

A: Of course. I just wanted it documented.

Mr. Appelbaum continued:

¹³⁹ Fritchman Exhibit # 6 is the actual lifeguard staffing utilized on particular days in the summer of 2017.

Q: Who makes the decision on how many lifeguards are out there that given day?

A: That would be Todd.

Q: Are you involved in that process in any way?

A: Not at all, only in setting up this template. And in setting up this template, what I wanted to do is to say that we need to be budget-driven and we need to say, I need to be able to go to the Commissioners and say, in the case of the lifeguards, the budget for the lifeguards was \$341,000.00 is what was allocated for the lifeguard budget this year.

One issue that cannot be clarified is whether there was a shouting or yelling match between Mr. Fritchman and Mr. Appelbaum. Mr. Fritchman states that he has a shouting match in sixty to seventy percent of his personal interactions with Mr. Appelbaum.¹⁴⁰ Mr. Appelbaum stated, on two separate occasions, that he has never had a shouting match with Mr. Fritchman. While at some time there may have been raised voices or heated conversations between Mr. Fritchman and Mr. Appelbaum, Mr. Fritchman's claim that they are in irate screaming matches sixty to seventy percent of the time cannot be substantiated by the testimony received from all witnesses.

In the end, while it is true that Mr. Appelbaum desired Mr. Fritchman to use what he believed was a better staffing model, and offered budget models in accordance with the staffing model proposed, Appelbaum never directed that staffing be reduced to eight lifeguards on Memorial Day weekend. Whether or not a shouting match occurred regarding the budget creation is unknown; but we are certain that conversations between Mr. Appelbaum and Mr. Fritchman do not devolve into a yelling match sixty to seventy percent of the time. In the end, Mr. Fritchman's own statement that Mr. Appelbaum told him regularly that he was

¹⁴⁰ Q How often was Mr. Appelbaum irate, screaming at you, in his tenure as the Town Manager?

A: I'd probably say sixty to seven percent of the time.

Q: So, in over half of your meetings, he was irate and screaming?

A: That's correct, especially when they were one-on-one.

going to let Mr. Fritchman run the beach patrol diminishes the likelihood of the veracity of the allegations in Letter paragraph 29.

30. Mr. Appelbaum has placed young staff members “in charge of DBP, who have no experience in lifesaving or EMS, and requires the Captain to report to them. Through this method, the DBP are humiliated and bullied into siding with Mr. Appelbaum.

There is no merit to this allegation whatsoever. The basis of this allegation, as stated by Mr. Fritchman, is as follows:

“I’d say February 2016, Jane Doe 6 was brought into the office where I was told consistently time and time again through subsequent meetings that I would be answering to Jane Doe 6 and that all of my purchase orders would go through Jane Doe 6 [(sic)] for approval. Certain things were taken away from me for purchasing and ordering, such as my uniforms, and they were placed in Jane Doe 6’s hands, purchasing and production of my Employee Work Agreement and handbook was put into Jane Doe 6’s hands, and I was told to report to Jane Doe 6 on a daily basis. So, I quickly became confused as to who my boss really was. I was reporting to Jane Doe 6, but I’m supposed to be reporting to the Town Manager, so that’s what I was instructed to do, to report to Jane Doe 6.”

Mr. Fritchman confirmed that Jane Doe 6 never had any involvement in staffing decisions within the DBP. And, Jane Doe 6 never overruled any of Mr. Fritchman’s decisions regarding the lifeguards and gave no logistical instructions to the lifeguard captain. Ultimately, the basis of this allegation is that Jane Doe 6 was tasked to order lifeguard uniforms, and to print the manual of the summer. And, she was also asked to coordinate the drug testing for the lifeguards.

Jane Doe 6’s testimony confirms that she has no idea what Mr. Fritchman taking about when he says young staff members being in charge of the Beach Patrol. She states:

Q: . . . paragraph number thirty, alleges that Mr. Appelbaum has placed “young staff members in charge of the Dewey beach patrol.” Do you have any understanding of what is meant by this claim of young staff members being in charge of Dewey beach patrol?

A: I do not.

Q: Do you have any speculation as to who those young staff members could be?

A: The only thing that comes to mind is Mr. Appelbaum has told Todd Fritchman that any purchase orders he completes have to come to me first, and then I make sure they are filled out complete before they go to Marc for approval. Other than that, there is nothing that comes to mind.

Q: And what types of things would be requested in the purchase order?

A: Lifeguard uniforms, employee handbooks for the lifeguards, because they do have a separate manual. If there are any, like if the ATV needs repairs, any work that needs to be done to the ATV; if there are supplies needed for the lifesaving station, like printer ink or anything like that.

Q: Are the purchase orders given to you already filled out?

A: Yes.

Q: Have you ever questioned a request on a purchase order?

A: I have not, no.¹⁴¹

Mr. Appelbaum also confirmed that he has never put Jane Doe 6 in charge of the lifeguard program. When asked directly, Mr. Appelbaum replied:

Q: Have you directed Mr. Fritchman to report to any particular employee?

A: No.

¹⁴¹ Jane Doe 6 went on to explain that Mr. Fritchman ordered uniforms from California and Mr. Appelbaum asked Jane Doe 6 to check with local vendors to see if the uniforms could be procured locally at a better price. A better price was received from a local vendor, and the lifeguard uniforms were procured from a local uniform vendor. Jane Doe 6 testified “I didn’t hear a good or bad response from Todd whether he was happy with that or not.”

Q: Do you have any suspicion or guess as to who Mr. Fritchman may be referring to when he says young staff members that he has been directed to report to?

A: The only thing that I could contemplate is that there are certain things like purchase orders. I will tell him if he wants to buy uniforms, I will say, submit a purchase order to Jane Doe 6 in my office and she will get them to me and I will approve them. But that's administrative. He doesn't report to her. He doesn't, she is only a conduit to get -- so, if you have payroll input forms, get them to her and then she will get them to me and I will sign them. He doesn't work in our building. He works in a different building. So, I will ask him to direct a, you know, if he wants to buy uniforms, I will say, please submit it to Jane Doe 6 and she will get it to me, and I will approve them. And I will approve them a hundred percent of the time.

And when asked directly if Jane Doe 6 has been put in charge of the DBP, Mr. Appelbaum confirmed that he has never put Jane Doe 6 in charge of the lifeguard program:

Q: What is Jane Doe 6's role or responsibilities regarding the lifeguards for the Dewey beach patrol?

A: Dewey beach patrol? You mean lifeguard patrol, not police patrol?

Q: That's correct, lifeguards.

A: Jane Doe 6 is [REDACTED]. Jane Doe 6 is [REDACTED], and those are her primary roles and responsibilities. She has no oversight of or supervisor capacity in any way over the Dewey beach patrol. She does administrative work when they need administrative work. As an example, if the lifeguard captain needs a repair done, if he has problems with his with a leak, he would call up Jane Doe 6 or e-mail Jane Doe 6 and say, could you get a plumber in here? So, as far as an administrative function, she will provide some administrative support.

Q: If you know, does she also do things like order uniforms or print manuals or anything of that nature?

A: What she would do is, in the past, if Todd gives me, what Todd would do when it comes to buying equipment, Todd would give me a purchase order. And the purchase order is saying, I need, you know, fifty sweatshirts and they are \$17.00 apiece, and I would like to buy them. I would ask Jane Doe 6 or Todd, I would get together -- in many years past, we get a couple of estimates before we commit to these dollars. It would be up to Todd or Jane Doe 6 to get me a couple estimates. The purchase orders would be given to Jane Doe 6. [REDACTED], Jane Doe 6, would give them to me, I would sign them, and then we would dispense with it. It's an administrative function. Todd, to my knowledge, is only staffed with lifeguards. He has no administrative staff. So, to the degree he needs something administrative, such as an ad placed in the paper, copies made of something, he might give it to Jane Doe 6 and say, could you make copies of these things?

Q: When you are speaking of Todd, we are speaking of Mr. Fritchman, I assume?

A: Yes. I'm sorry.

Q: Is Jane Doe 6 involved with any staffing decisions with respect to the lifeguards?

A: Absolutely not.

Based on the foregoing, even taking Mr. Fritchman's comments in the light most favorable to his position, having administrative staff order uniforms, coordinate purchase orders, and organize drug testing does not in any way put young staff members in charge of the lifeguard program. And, in so doing, such acts cannot credibly be deemed humiliating or bullying.

- 31. Mr. Appelbaum conducts staff meetings with DBP lieutenants (without the Captain’s knowledge) and prohibits the Captain of DBP from attending the meetings. In this way, Mr. Appelbaum interferes with the command structure and asserts his control over the employees of DBP, who should be reporting only to the Captain. Mr. Appelbaum has taken control over all disciplinary issues within DBP, essentially stripping the Captain of authority over DBP employees. Because Mr. Appelbaum is completely unfamiliar with the rules and requirements for lifeguard certification, training, and discipline—i.e. he is ill-equipped to know whether a DBP employee has violated an essential rule or tenet of the employee’s job—this pose a threat to public safety. When members of DBP do not understand to whom they report or are accountable and when the rules of their employment are arbitrarily enforced, discipline is difficult to maintain.**

The contention that Mr. Appelbaum conducts staff meetings (plural) with the lifeguard “lieutenants” without Mr. Fritchman present again lacks a factual basis. We interviewed John Doe 10, one of the DBP Lieutenants. He has had a total of two meetings with Mr. Appelbaum. The first meeting was “a few years back”¹⁴², during which Mr. Appelbaum questioned Mr. Fritchman’s leadership style. John Doe 10 also recalls a second meeting “a few years back” where the lieutenants tried to explain to Mr. Appelbaum why they believed his proposed staffing model would not work. Beyond that, those were the only meetings that John Doe 10 attended. According to Mr. Fritchman, the second meeting regarding the staffing models happened two seasons ago.¹⁴³

We submit that a pair of meetings, held years ago, does not connote regular staff meetings between Mr. Appelbaum and DBP lieutenants. Moreover, a pair of meetings held more than two seasons ago does not and cannot undermine the

¹⁴² Mr. Appelbaum testified that the meeting occurred in 2013, but the exact date of the meeting is unknown. Mr. Appelbaum testified that a long time EMT brought up some disturbing things about Mr. Fritchman’s leadership style, and he had a short meeting (approximately thirty minutes) with all lieutenants.

¹⁴³ Mr. Fritchman also contends that John Doe 14 was called into see Mr. Appelbaum after he quit the DBP over a staffing dispute. When asked about John Doe 14, Mr. Appelbaum had limited knowledge of John Doe 14.

command structure of the lifeguard program, and any contention that two such meetings can have a substantial impact on the command structure is unfounded. Indeed, there is nothing in the Code that prevents the Town Manager from conferring with any employee of the Town, and even if he did have regular staff meetings with lifeguard lieutenants, the Town Manager has the ability to do so pursuant to his authority under Sections 16 and 19 of the Charter.

It is similarly unfounded that Mr. Appelbaum has “taken control over all disciplinary issues within DBP.” Based on witness testimony and related documentary evidence, this allegation is based upon Mr. Fritchman being advised this year that he was required to consult with the Town’s HR consultant or the Town Manager before suspending or terminating any DBP employee. While Mr. Fritchman clearly did not like to have a human resources check before suspending or terminating an employee, having a second level review certainly does not amount to taking control of all disciplinary issues regarding the lifeguards; presumably, a second-level review makes practical sense. To be clear, Mr. Fritchman did not identify a single instance where his proposed discipline of an employee was overruled.

Finally, the idea that Mr. Appelbaum has taken control of discipline within the lifeguard ranks is refuted by the lifeguard lieutenant John Doe 10:

Q: Question, who handles disciplinary issues within the Dewey Beach patrol?

A: Depending; I mean, the Lieutenants handle, you know, your regular discipline. You know, if somebody is late, if somebody is doing something on the beach, you know, late to their post or not working out, something along those lines, the Lieutenants handle that directly and then we let the Captain know. All those infractions are written in a book that we keep track of the infractions with the date, time, and we let the Captain know -- hey, this is what happened, and they were given whatever the punishment is according to our handbook. We do handle those things, but we also inform the Captain of what was done and what the infraction was.

Q: Paragraph thirty-one of the Complaint, it says Mr. Appelbaum has taken control over all disciplinary issues within DBP. My question is, are you aware of any disciplinary issues within the DBP that were handled by the Town Manager?

A: No.

Beyond this, there is no dispute that members of the lifeguard patrol know to whom they report. John Doe 10 made it clear that:

I know that as far as beach patrol members are concerned, they report to their Lieutenants or the Captain and no one outside of our direct agency, and I don't know who he reports to at Town Hall. I thought it was Mr. Appelbaum. I don't know that he has reported to anybody else. To my knowledge, as far as us reporting, we only report to the Captain and then the younger guards do report to us.

Simply, there is no credible or sufficient evidence to support the allegations made in paragraph 31 of the Letter.

32. Mr. Appelbaum prohibits the Captain from attending Town meetings, speaking to Town Commissioners regarding DBP, or answering questions from the public regarding DBP. The DBP was told to “shut up” and not discuss any matters pertaining to DBP with anyone but the Town Manager.

Mr. Appelbaum testified that he never said to Mr. Fritchman that he could not speak to Town Commissioners and he never prevented Mr. Fritchman from attending Town meetings. Mr. Appelbaum, however, did confirm that Mr. Fritchman was asked to not give his yearly report verbally anymore, because it was too long. Mr. Fritchman gave a similar statement.

Mr. Fritchman's testimony is that since Mr. Appelbaum became Town Manager, he has been prohibited from talking to any Commissioners; which Mr. Appelbaum denies. The following testimony illustrates Mr. Fritchman's perspective:

Q: I think we have gotten through all the allegations except for number thirty-two, although we have discussed it. It says Mr. Appelbaum prohibits you from attending Town meetings.

A: That's correct. I have also been told that I'm not permitted to speak to any Town Commissioners at any time.

Q: When did that happen?

A: Basically, when he became Town Manager, he called me into his office and told me that anything that happens regarding my department and anything that happens in his office behind a closed door, I'm not to communicate with the Commissioners on anything to do with the Town of Dewey Beach, and he said that not only to me in private but he said it in multiple meetings in front of other people as well, other department heads. I don't know the dates and times of these meetings.

Q: Do you know who the other department heads [that] might have heard that would be?

A: I believe Bill Mears may have been in the room when that was stated. John Doe 1 was probably in the room when that was stated, but he made it clear to me on multiple occasions.

Q: Do you know if he put it in writing or sent an e-mail and had a policy?

A: I don't think that was in writing. It was all verbal.

Q: I'm just reading from the language here. Was the DPB told to shut up and not discuss any matters pertaining to the DBP with anyone but the Town Manager?

A: That's correct.

Q: And that has been an ongoing policy?

A: That's been an ongoing policy reiterated time and time again.

Q: Since when?

A: Since his tenure began as Town Manager.

Neither John Doe 1 nor Mr. Mears corroborate Mr. Fritchman's claims. Mr. Mears has no personal knowledge of the Town Manager preventing Mr. Fritchman from attending Town Meetings. He testified:

Q: Do you know if he's [Mr. Fritchman] been prohibited from attending town commissioner meetings?

A: Not personally, I don't know that.

Q: Do you know if Mr. Appelbaum has directed Mr. Fritchman from answering any questions from the public regarding the Dewey beach patrol?

A: No personal, no.

Q: Do you know if Mr. Appelbaum has prevented Mr. Fritchman or anyone from the lifeguards from speaking to the town commissioners regarding the Dewey beach patrol?

A: No personal.

John Doe 1 states the story a bit differently. He states as follows:

Q: Do you know if Mr. Appelbaum has prevented the Beach Patrol Captain from attending Town meetings?

A: No.

Q: Or from speaking to Town Commissioners?

A: Yes. I'm aware of Gary Mauler -- good old Gary, trying to -- he would try to meet with Todd separate and never let Marc know what's going on, and it was just the opposite. I remember Marc telling me that -- Todd was not there -- I remember him telling me, I don't want Todd and them just meeting privately and then coming back and throwing all these budget things at me when I don't have a chance to know. I want to be there. If they are going to meet, I want to be there. Or if Gary wants to meet with Todd, fine, but I would like to be present.

Q: Any other Commissioners told not to meet in private with the Beach Patrol Captain by Mr. Appelbaum?

A: Marc doesn't want anybody -- he says if they are going to meet, I'd like to be there as their supervisor. I don't know. I mean, his insistence has been, if they are going to meet with my employees, I'd like to be aware of the meeting or for me to be there.

John Doe 1 statement is consistent with the testimony of Mr. Appelbaum where he stated that, when Town employees are speaking to former Commissioner Mauler, he would like to be present.¹⁴⁴

Based upon the statements received, we find that Mr. Fritchman's assertion that he is not allowed to speak with Town Commissioners or attend Town Meetings is at best a misconstrued interpretation of Mr. Appelbaum's requests and statements.¹⁴⁵ If such an all-encompassing, repeated directive had been made, presumably either John Doe 1 or Mr. Mears (the two department heads identified

¹⁴⁴ "I said to Sam, listen, if you want to talk to Gary, talk to Gary, do whatever you want, but I'd like to be there so I can understand what's going on because it is turning into a problem. I said, I don't care what you talk to Gary about what you want to, but I'd like to be involved in it. If you want to talk to a Commissioner about me, talk to the Mayor. If you ever have a problem with me, talk to the Mayor. If you have a problem with me, talk to the Solicitor. If you want to complain about me and you don't want me to hear what you're saying about me, talk to the Mayor. Don't talk to a Commissioner about that. It's inappropriate. Sam, you want to talk to Gary, have me in the room. Feel free to talk to Gary, just have me in the room. I did do that. I recall doing that. I don't recall the exact words, but those were my sentiments."

¹⁴⁵ Mr. Fritchman's own statements appear to belie the claims in paragraph 32. His complaint appears to be that he is not invited to Town meetings. As he stated at the beginning of his interview:

Q: Regarding other reports, is it a policy of the Town that you are not allowed to attend Town meetings?

A: I have not been invited to attend any town meeting. *It's a public meeting, so I'm obviously allowed to go if I wish, but I have not been requested to provide anything to the Commissioners and asked not to come to meetings.* I was also denied or not asked to come to department head meetings that were held regularly throughout the off season. And often times, in these department meetings, the Town Manager spoke on behalf of the Beach Patrol about our staffing and our process and so forth. So, he assumed the role of Beach Patrol Captain in these department head meetings throughout the course of the winter. (emphasis added)

by Mr. Fritchman) would have provided corroboration. No other employee has testified that they, or other employees, were expressly directed or forbidden to attend Town meetings or speak with sitting Commissioners, or that they in fact stopped attending meetings if they so desired, or if they did attend, were then discipline in some fashion by Mr. Appelbaum.¹⁴⁶

33. The DPB requires its employees to undergo drug testing. Federal privacy rules under HIPAA limit the individuals who can see results of such testing; under HIPAA the Town Manager is, not permitted to view the results of drug tests administered to DBP employees, however, Mr. Appelbaum routinely asks for and views the results of these tests.

Section 20-8(A)(1) of the Dewey Beach Town Code requires that full time employees that are drug tested (which includes lifeguards) are subject to a mandatory two week suspension for the failed test. In the course of this process, it is clear that Mr. Appelbaum has asked to know which employees are suspended, because he has asked that he or the Town's HR consultant be informed prior to an employee being suspended or terminated. Indeed as of May 23, 2017, Mr. Appelbaum indicated that he wanted to be involved "where positive test results were revealed." But that came with a caveat: HIPAA laws would need to be reviewed.¹⁴⁷ Eventually, the Town sought guidance from the HR consultant on this issue, and it was determined that there would need to be a business reason to share the information with Mr. Appelbaum or the Police Chief (who, apparently, also asked for the drug testing results).

In our view, there is little doubt that Mr. Appelbaum requested drug test results in some form because he asked to be informed before anyone was suspended or terminated. However, no witness, including Mr. Fritchman, ever corroborated the claim that Mr. Appelbaum has *viewed* the results of any drug tests of lifeguards. As best we can tell, Mr. Appelbaum did ask to see the results of the drug testing, but was never provided the results, and therefore he did not view them.

¹⁴⁶ We note that Mr. Appelbaum demanded to be present when employees met with certain Town Commissioners. As far as we are aware, there was no express prohibition against any contact whatsoever.

¹⁴⁷ REP 80 (8(b)).

F. IMPROPER INTERFERENCE WITH THE OFFICE OF THE BUILDING INSPECTOR

- 34. Although he has no experience as a building inspector and little familiarity with the relevant building codes, Mr. Appelbaum continually interferes with the job of the building inspector by insisting on seeing certain applications and directing the building inspector on how to handle applications.**

As a threshold matter, we could not locate, and Mr. Mears could not identify any “office of the building inspector” in the Dewey Beach code. While several places in the code refer to the building inspector, there does not appear to be a separate and distinct “Office” of the building inspector. Moreover, under Section 16 of the Town Charter, the Town Manager supervises the building inspector and all functions and services provided by that position. We do recognize, however, that the Town’s position of a building inspector is imbued with the authority to enforce Chapter 71 of the Town Code (Building Construction), and our investigation is not intended—and should not be construed—to be a detailed analysis of the Town Manager’s authority over the Town’s building code enforcement matters, vs. the building inspector’s authority. Essentially, we have concluded that the Town Manager is not expressly or absolutely excluded from exercising judgment and authority over the Town’s construction code and permitting process. And, this appears to be a normal practice for Town Managers.¹⁴⁸

As described by Mr. Appelbaum, his involvement with Mr. Mears is complaint driven. Day-to-day, Mr. Appelbaum contends that he is not involved with Mr. Mears’s work. Only when there is a complaint or a dispute does Mr. Appelbaum become involved. For Mr. Mears’s part, we asked him to provide examples of each and every time that Mr. Appelbaum allegedly interfered with his job, and we asked Mr. Appelbaum about most of these incidents.

Upon review of the numerous incidents described by Mr. Mears, we cannot conclude that Mr. Appelbaum regularly exceeded the Town Manager’s authority, or unreasonably or detrimentally interfered with Mr. Mears’s performance of his

¹⁴⁸ Chief Mackert confirmed that he was involved with permit decisions when he acted as Town Manager.

duties.¹⁴⁹ Most of the incidents that Mr. Mears claims are interference relate to issues of judgment or code interpretation. Many of the instances required consultation with the Town Solicitor. Others relate to a lack of communication. In the situations presented, however, it was not unreasonable for Mr. Mears's supervisor to be involved with certain matters, especially complaints.¹⁵⁰

- 35. Mr. Appelbaum often tells certain Town residents that they do not need permits, in violation of the Town Code. Mr. Appelbaum also interferes with the proper issuance of building permits in order to punish his perceived enemies. By reviewing applications, Mr. Appelbaum determines whether anyone on his "enemies list" is seeking a permit and then obstructs the applicant's ability to obtain a building permit. As a result of this interference, even when neutral application of the Building Code would result in the applicant receiving a permit, Mr. Appelbaum forces the building inspector to deny the permit. Mr. Appelbaum has even gone so far as to change the Building Code in order to deny applications. On two occasions, this has resulted in lawsuits. Mr. Appelbaum's use of the permitting process as a weapon to punish his enemies, violates the applicants' Constitutional rights to substantive due process and equal protection, and undermines the authority of the building inspector.**

¹⁴⁹ During the investigation, Dewey Beach residents / business owners Rich Hanewinckel and Marcia Schick submitted a request to be interviewed through their attorney. This request was denied because it was too attenuated from the nature and focus of the investigation: employee complaints. Mr. Mears, however, was asked whether Mr. Appelbaum interfered with a pool project, which, upon information and belief, is the/a subject the prompted the interview request. While he might have approached the matter differently, Mr. Mears did not allege any direct or substantial interference from Mr. Appelbaum on that project. Instead, he stated that the Town was submitted "a fraudulent plot plan."

¹⁵⁰ It is clear from the historical document production that Mr. Mears's performance job has been an issue for some time. Indeed, documents relating back to 2013 indicate that a movement was afoot to reform the Building Inspector position; potentially transforming the job into a contractual position, and possibly replacing Mr. Mears. However, Mr. Appelbaum stated that he did not want to replace Mr. Mears; rather, he wanted to put him in a position to where his skills were best utilized.

When pressed on the allegations in Letter paragraph 35, Mr. Mears retracted several of the allegations. With regard to an alleged enemies list, Mr. Mears testified:

Q: Do you know if Mr. Appelbaum has an enemy list?

A: I indirectly think he does, yes.

Q: Do you have any personal knowledge of who is on that enemies list?

A: Well, as I told you previously, he'd like to put the owner of the Rusty Rudder out of business.¹⁵¹

Q: I know you've said that a couple of times. Can you give me a specific example of when he said that?

A: On different occasions when he's had complaints about Northbeach and things of that nature with noise and stuff like that, he's made reference that: He shouldn't even be in business, and that's why we've got to get rid of grandfathered conditional uses. It's things of that nature.

Q: Beyond that owner that we just discussed, do you know anyone else who is on the enemies list?

A: Well, I wouldn't call them real enemies of this nature. But he's probably, like I said, held up procedures on jobs, because he wants to be in on the review of them if he doesn't think that business should be able to expand or improve or anything else.

Q: What I'm getting at is: Do you know of or is there a particular list that he keeps or, speaking more generally, does he –

A: I have no clue whether he has a list made-up.

Mr. Mears can cite only one instance where he was allegedly forced to deny a permit – the canopy for the Rusty Rudder. But, as we understand it, no formal

¹⁵¹ The Rusty Rudder is owned by Mr. Alex Pires, who served as the “attorney” that drafted the June 14th Letter.

application has been made for that project. Thus, in our view, asking for more detailed information cannot be deemed to be a denial. Beyond this one instance, Mr. Mears can cite no permit denials.¹⁵²

Q: And beyond that instance, my question is: Are there any other instances where Mr. Appelbaum has forced the building inspector to deny a building permit or a permit?

A: Not at this time, no, I can't think of any.

Regarding his claim that denials violate applicants' constitutional rights, he cites only the pool lawsuit with Rich Hanewinkel and Marcia Schick, and the denial of the canopy for the Rusty Rudder. Again, his contentions in Letter paragraph 35 cannot be squared with other testimony, wherein he claims that the pool plans submitted by these applicants were fraudulent. (See FN 149) Moreover, while Mr. Mears may believe he should have the authority to approve the canopy for the Rusty Rudder, Mr. Appelbaum's seeking additional information before the canopy was approved cannot be deemed a denial of due process.

36. Mr. Appelbaum's interference in the permitting process is so pervasive that during an argument with the building inspector, when the building inspector refused to apply the code the way the Town Manager sought, Mr. Appelbaum shouted, "Now I have to be the building inspector"

There is no dispute that this incident occurred. Mr. Mears refused to require a homeowner to remove a dumpster that was improperly placed during construction. As a result, there was a verbal altercation between Mr. Mears and Mr. Appelbaum about this dumpster. Mr. Appelbaum issued a reprimand to Mr. Mears regarding this incident. We cannot conclude that Mr. Appelbaum acted improperly in this instance.

¹⁵² When asked about the allegations in Letter paragraph 36, Mr. Mears's statements were erratic, and at times, very difficult to discern. So as not to misstate Mr. Mears's comments, pertinent pages of his transcript are included in the appendix to this report. REP 81-95.

37. When applicants pay the fee for a permit or a building expansion, that money is supposed to be earmarked for the office of the building inspector; however, it appears that those funds are diverted by the Town Manager for other purposes.

From the evidence provided—including the testimony of Town Finance Directors Jane Doe 9 and Jane Doe 2, Bill Mears and Mark Appelbaum, and budget and revenue documents—this allegation does not appear to be true. The basis of this allegation is that Mr. Mears allegedly keeps a running tally of building permit fees each month,¹⁵³ and his record of those fees is different than what is placed in the Town financial documents. Per Town ordinance, 20% of the building permit fees are directly apportioned to the Town’s infrastructure maintenance and improvements escrow account.¹⁵⁴ The remainder of the fees constitute general revenue for the Town. There was no citation to the Town Charter, Code or an ordinance dictating that building permit fees must be “earmarked” in any particular way. If there is such a directive, there is no indication in the Town’s audited financial statements that demonstrate any improper accounting or allocation of building permit fee revenue.¹⁵⁵

¹⁵³ REP 96-97.

¹⁵⁴ Town Code, § 93-2.A.

¹⁵⁵ REP 98-107.

G. OTHER IMPROPER/DISHONEST DEALINGS

- 38. In violation of the Town rules and without permission, Mr. Appelbaum took the Town's automobile on a long-distance trip to New Orleans. On this trip, Mr. Appelbaum got into an accident, which he subsequently hid from Town Commissioners. It was not until the City of New Orleans police report was made available that the true facts were learned. Despite this misuse of the Town's car, accident, and attempt to cover up both the misuse and the accident, the Commissioners and the Mayor took no action against Mr. Appelbaum but rather facilitated his malfeasance by attempting to hide the incident from the public. This failure to control or address Mr. Appelbaum's conduct showed Town employees the extent to which no one supervises Mr. Appelbaum's conduct and he is answerable to no one.**

We place very limited stock in this allegation. The Town Commissioners, have, for some time, been aware of this incident. The plain language of Mr. Appelbaum's 2013 employment contract with the Town indicates that he will be able to have full use of the Town Manager vehicle until the car lease expires or is sold.¹⁵⁶ The Town Manager must purchase the gas, but insurance, maintenance and repairs are the Town's responsibility. If Mr. Appelbaum has full use of the vehicle, there is certainly nothing that prohibits him from driving the car to New Orleans.¹⁵⁷

¹⁵⁶ REP 114.

¹⁵⁷ Mr. Stickles, the prior Town Manager, had materially different language in his contract regarding use of the Town vehicle. He was only permitted to use the car for commuting and Town business. REP 110.

- 39. On another occasion, in violation of Town rules and without permission, Mr. Appelbaum allowed his daughter to drive the Town vehicle to and in North Carolina. During her unauthorized use of the Town vehicle, Mr. Appelbaum's daughter received a traffic ticket, which was only revealed when the Town clerk received a notice of it at the Town offices.**

For the reasons stated above in response to paragraph 38 of the Letter, we also place very little stock in this allegation. Additionally, only one witness claimed even indirect knowledge of this alleged incident. Chief Mackert stated that in 2014 Jane Doe 15, a former Town employee, [REDACTED], told him that she opened up an envelope that revealed that the Town's vehicle had received an automated violation as a result of a red light camera or a speed camera. Jane Doe 15 indicated that the ticket came from North Carolina. Chief Mackert stated that it was Mr. Appelbaum who commented to Jane Doe 15 that he had allowed his daughter to drive the vehicle. Mr. Appelbaum vigorously denies that he ever allowed his daughter to drive the Town vehicle, and denies that the Town vehicle was ever driven in the State of North Carolina. He instead insists that he received a speeding ticket in Maryland while driving the vehicle. When the "bookkeeper" brought the ticket to his attention, he chose not to contest the ticket, and wrote a check to the Town for the amount. We accept Mr. Appelbaum's statements on this topic, and absent any documentation or direct testimony regarding this allegation, we cannot determine that Mr. Appelbaum improperly permitted his daughter to use the Town vehicle.

- 40. When employees attempt to question the propriety of a directive from Mr. Appelbaum, they are told that he knows best, regardless of the subject matter, because he is "well-educated." The truth is that Mr. Appelbaum has no formal education.**

Mr. Appelbaum denies making any such statements regarding his education, and absent direct testimony to substantiate this claim, we cannot determine whether such conversations ever occurred. However, it is clear that Mr. Appelbaum's level of education is irrelevant to the claims of misconduct and mismanagement levied against him.

- 41. Although he brags to employees about his success as a businessman, Mr. Appelbaum and his brother operated a business that went into bankruptcy, owing Delaware and Maryland residents hundreds of thousands of dollars.**

Mr. Appelbaum denies bragging about his business expertise. Again, absent direct testimony to substantiate this allegation, we cannot determine whether he ever made such claims. For his part, Mr. Appelbaum stated that he was a part owner of a business that entered into Chapter 11 bankruptcy. When the business emerged from bankruptcy, his partners exited, and he managed the business for four years before selling it. We cannot conclude from the record that Mr. Appelbaum cost the taxpayers of Delaware and Maryland hundreds of thousands of dollars, nor can we conclude that any such claims—even if somehow true—are relevant to the subject matter of the allegations against him.

- 42. In view of Mr. Appelbaum’s lack of formal education and fiscal difficulties, it is unclear whether, in view of the Town Manager’s extensive authority over all aspects of Town management including disbursement of funds, Town Commissioners have fulfilled their responsibilities under Section 15(b) of the Town Charter to “impose such qualifications for Town Manager as may be deemed necessary.”**

This paragraph is based upon the incorrect and off-base premise that Mr. Appelbaum has experienced “fiscal difficulties,” and that a formal education is a necessary qualification for a Town Manager. It also fails to state any claim against either Mr. Appelbaum or the Commissioners, saying only “it is unclear whether . . . Town Commissioners have fulfilled their responsibilities . . . to ‘impose such qualifications for Town Manager as may be deemed necessary.’” Finding no evidence to support these speculative comments, we cannot conclude that this paragraph is evidence of any wrongdoing by Mr. Appelbaum.

The Letter concludes by alleging that the Town, Commissioners and Mayor are legally liable and indicating that absent immediate action by the Town they intend to seek “legal relief.”

By ignoring complaints from Town employees and sanctioning the abusive, improper, and illegal conduct and policies of Mr. Appelbaum, as detailed above, the Town Commissioners and the Mayor have exposed both

themselves individually, and the Town as an entity, to legal liability for Mr. Appelbaum's actions. If the Mayor and the Commissioners do not take *immediate* action to remove Mr. Appelbaum and put an end to the toxic and abusive work environment detailed above, we the undersigned employees intend to seek legal relief in court.

VIII. ANALYSIS OF PIC COMPLAINT

After sending the Letter and releasing it to the press, the Complainants and Diane Jones files their Verified Complaint with the PIC on June 29, 2017. The Complaint incorporated by reference the Letter, a complaint by current Court Clerk Diane Jones dated June 27, 2017, and a complaint by former Town Manager Diana Smith dated December 1, 2010. The Complaint levied additional allegations not contained in the Letter, including allegations that Mr. Appelbaum had misused Town funds to purchase employee gifts and had used his position to demand the Town provide him medical benefits. The Complaint concludes with a list of allegedly improper events that took place after the Letter was made public, and made requests for a complete investigation, and an expedited hearing to suspend Appelbaum with pay.

An examination of relevant claims in the Complaint follows.

Paragraph 7 – In a complaint dated December 1, 2010, a former Town Manager, Diana Smith, complained of sexual harassment and abusive conduct by Appelbaum at a time when he was a commissioner (and, therefore, her boss.) A copy of the letter is attached hereto as Exhibit C. On information and belief, no investigation was performed concerning these allegations and there were no adverse consequences to Appelbaum. Instead, the town council accepted the subsequent resignation of Ms. Smith, paying her severance and relocation expenses to leave town. At the time of this complaint, Commissioner Diane Hanson was the Mayor of the town and Appelbaum was a Commissioner.

It is our understanding that this complaint, which occurred over seven years ago, was resolved when the Town accepted Ms. Smith's resignation on September 9, 2011 pursuant to the terms of a General Release and Settlement Agreement signed the same day. On October 6, 2011, the then Commissioners wrote to Mr. Appelbaum to explain the situation. Our role was not to question the Commissioners' decision; therefore, we did not independently investigate Ms.

Smith's allegations. We do note, however, that the Town wrote a letter of apology to Mr. Appelbaum regarding this situation.

Paragraph 8 – In a complaint to the Dewey Beach Town Council dated June 27, 2017, Diane Jones, the judicial clerk for the Dewey Beach Alderman Court and a movant here, alleged that Appelbaum engages in improper behavior including harassing and demeaning conduct in the office, demands that she perform services that violate the Town's Charter, and attempts to have her provide information from the court's filed and the police files in violation of law.

The substantial portion of Jane Doe 7's individual allegations have been addressed in our discussion of the Letter, above. Jane Doe 7 also alleged that "the town has said it will not reimburse me for my training or expenses in getting the training." She stated in her interview that she felt it should be covered, and that she asked both Jane Doe 6 and Jane Doe 1, but never heard back. Mr. Appelbaum stated that he has no idea whether she was paid. He denies that he ever denied a request from Jane Doe 7. While Jane Doe 7 stated that she had attended training and expected to be paid, she did not state that she had submitted for reimbursement. However, evidence provided by the Town's administrative employees demonstrates that the Town paid for some type of off-site training for Jane Doe 7, and there has been no demonstration that she was not paid for the normal work hours she used to complete the training.

Jane Doe 7 also alleges she is prohibited from frequenting places of business in Dewey Beach. This practice does not appear to have originated with, nor is it a result of, a directive by Mr. Appelbaum.

Paragraph 10 – On information and belief, Appelbaum has misused town funds to purchase gifts [sic] cards worth \$2,000 to five as retirement gifts to a person loyal to him without first obtaining authorization from town council. In addition, other retiring employees are not treated equally.

Mr. Appelbaum does not deny that he sought and received approval from the Mayor to provide a former, retiring Maintenance Supervisor \$2,000 in gift certificates toward a cruise and airfare. He claims his motivation was because of the employee's long and productive career with the Town, and, in particular, because the retiring employee agreed to remain available to assist with any maintenance-related duties and information the Town might need as it transitioned

away from his tenure. According to Mr. Appelbaum, that employee was accessible and has aided the Town post-retirement. He requested permission for the gratuity from the Mayor, who authorized the purchase as long as the Town was hitting its budget.¹⁵⁸

This can be contrasted with Jane Doe 8, who also resigned under Mr. Appelbaum's leadership, but did not receive a gratuity in the amount of \$2,000 from the Town when she left her employment. Jane Doe 4 told us that the Town also did not throw Jane Doe 8 a party as it had for the Maintenance Supervisor.

We are unable to conclude based on the evidence reviewed that the retirement gift was a misuse of Town funds, or that it violated Section 10-5 of the Town Code, or any other provision in the Town Charter or Code. We agree that other retiring employees did not receive the same gifts, but we cannot conclude that this constitutes a violation of State law or the Town Code.¹⁵⁹

Paragraph 11 – On information and belief, Appelbaum used his position to demand that the Town provide him with medical insurance benefits even though it was not part of his contract of employment.

In the summer of 2012, former Town Manager Bob Stickels allegedly resigned his position with no notice. At the time of his resignation, Mr. Stickels did not have access to health insurance through the Town, but he did have access to a Town vehicle. According to Mr. Appelbaum, this was Mr. Stickels' preference. When members of the Town Commissioners approached Mr. Appelbaum to step in for 90 days as the interim Town Manager, he decided to accept use of the Town car in lieu of health insurance for two reasons: (1) he did not want to go off of the health insurance plan that he purchased for his family for the 90 days he intended to serve as interim Town Manager; and, (2) he did not want the Town to incur the cost of such insurance coverage when it was already committed to the 36-month lease of the Town vehicle plus vehicle insurance.

In June 2013, in response to concerns raised about his use of the Town car, including a trip to New Orleans, Mr. Appelbaum stated that his "preference would be to eliminate the car immediately," and "to have the town pick up [his] insurance

¹⁵⁸ See REP 130.

¹⁵⁹ Ultimately, we believe it is Commissioners' role to police this behavior if the Commissioners disagree with the decision of the Town Manager to provide the retirement gift.

as they have for all recent Town Managers before Bob Stickels.”¹⁶⁰ In July 2014, Mr. Appelbaum again wrote to the Mayor and Commissioners, requesting to “liquidate” the Town vehicle because it had become an “unwanted burden for [him] and a distraction for the town.”¹⁶¹ Mr. Appelbaum proposed a plan which would ultimately save the Town \$1,487 in annual insurance premiums. In exchange for liquidating the vehicle, Mr. Appelbaum requested health care coverage; the Town agreed.

In October, 2014, Mr. Townsend as Town Solicitor wrote to Jane Doe 15, the Director of Accounting, to authorize the payment of a cash substitute for the benefits not offered to Mr. Appelbaum, in the form of a family health and dental insurance policy. On March 12, 2016, Mr. Appelbaum executed a new employment agreement as Town Manager, which provided that the Town would continue to pay him the cash equivalent for health insurance and dental benefits until the open enrollment period in 2016, after which, the equivalent payments would cease.

From the testimony and documents reviewed, we are unable to conclude that Mr. Appelbaum somehow abused his position as Town Manager to “demand” that the Town provide him with medical insurance benefits. Rather, the grant of medical benefits to Mr. Appelbaum appears to be the result of a standard negotiation between an employer and employee. In addition, these payments (and the planned sunset of the same), are memorialized in Mr. Appelbaum’s employment agreement, dated March 12, 2016. Nor is there any evidence that it is improper for the Town Manager to be provided with a health care benefit.

IX. ANALYSIS OF INDIVIDUAL COMPLAINTS

As stated above, the initial scope of our engagement was limited to complaints made against Mr. Appelbaum by Town employees in his capacity as Town Manager, as set forth in the Letter. After the Letter was made public, several other individuals came forward with letters similarly criticizing Mr. Appelbaum. These included complaints by Diane Jones, Martha Sweeney, Katrina White, Barbara Kyewski, Robert Belmonte, and Richard Solloway; all of which were publicized by these individuals, their representatives, or with their tacit consent. Of these, Martha Sweeney, Katrina White, Barbara Kyewski, Robert

¹⁶⁰ REP 127-128.

¹⁶¹ REP 129.

Belmonte, and Richard Solloway were neither a signatory to the Letter, nor the PIC Complaint.

A. Diane Jones

The substantial portion of Ms. Jones's individual allegations has been addressed in our discussion of the PIC Complaint, above.

B. Katrina White

The substantial portion of Ms. White's individual allegations has been addressed in our discussion of the Letter, above.

C. Barbara Kyewski

The substantial portion of Ms. Kyewski's individual allegations has been addressed in our discussion of the Letter and the PIC Complaint, above.

D. Rick Solloway

Mr. Solloway, a former Mayor and Commissioner, submitted his individual Complaint on July 5, 2017. He is no longer affiliated with the Town. We decided not to interview Mr. Solloway, as his complaint fell outside our scope.

E. Richard Belmonte

Mr. Belmonte, a Dewey Beach resident for 13 years, submitted his individual Complaint on July 5, 2017. He is not and has not been affiliated with the Town. We decided not to interview Mr. Belmonte, as his complaint fell outside our scope.

F. Martha Sweeney

The statement of Martha Sweeney is one of the most difficult of the allegations to resolve because there are no witnesses, and no contemporaneous documents to support her claims, or Mr. Appelbaum's contrary claims. Mr. Appelbaum responds to Ms. Sweeney's affidavit as follows:

A: Martha Sweeney, who I have met before, she came to the office about 5:15 that day. I was just getting ready to leave the building when I saw her walking up to the building with checks. Everybody had gone. It was about 5:15,

5:30 in the afternoon. She came in and she said, I'm here to pay the business license fee. I said, come back in, because I had to give her some type of receipt to acknowledge she had paid them. I said, I really appreciate you paying them on time. I know it's a pain in the neck. I'm sorry we had to go this route, but I really needed you to pay these on time and I appreciate it. She explained to me that the owner doesn't put money into the account until later in the season. He strips the account and they have no money in the account. Not my issue. Not my problem. I said thanks very much. She left. That was the end of the story. It was probably three minutes in my office. I only brought her into my office so I could accept the checks and I could give her some type of receipt, which is what I did.

Q: Did you ever sit down?

A: We probably sat in my office for a minute or two. It was probably less than three minutes. When I spoke to her, we sat down. I didn't do anything else. My door was open. There was no closed door, nothing.

Q: Did you sit in a chair next to her?

A: I don't recall. It could have been. I have three chairs in my office, and I have a desk. I could have sat on the same side. It was 5:30 in the afternoon. I don't remember. I wasn't expecting her to come in. Normally, the people come in and pay the money at the window to Jane Doe 6. I never called and demanded she pay it. I never demanded she come in after hours. This came as a complete shock to me when I read this. She came in several times after that. When she asked to meet with me, I always, always had a witness there with me. I really try not to meet with people in my office unless there is a witness. I try not to; the Town is just too controversial.

Q: During the time that you were in your office receiving the business license checks, did you put your hand on her knee?

A: No.

Q: Did you tell her if she played her cards right, some day she could have your job?

A: No.

Q: How did the time you had with her for the receipt of the checks, how did that end?

A: I said thank you.

Q: She left; you left?

A: Yes. She left and then I put the checks on Jane Doe 6's desk to process the business license.

Ms. Sweeney's recollection is very different. Ms. Sweeney says that she was called by Mr. Appelbaum, and told that they had to pay the business license fees that same day (a claim Mr. Appelbaum denies). Her recollection is that Jane Doe 10 was in the office, and someone was in front of her in line. Apparently Mr. Appelbaum asked for her to go back to his office, and she left the checks with Jane Doe 10.¹⁶² As the tale is told by Ms. Sweeney:

A: We came in the door together, and he said: Have a seat. So I still didn't know why I was there. And I felt like -- I don't know -- I was in the principal's office or something. So I went and sat in that chair --

Q: So that's the chair that's closest to the door?

A: -- close to the door.

Q: Okay.

A: And I expected him to sit there, but he didn't. He walked around, kind of crowded me, and said: Move down. So I sat here, facing his desk. And he sat there.

MR. WALTON: Let the record reflect that Ms. Sweeney said that she was asked to move to the chair that was closest to the far wall.

¹⁶² When Jane Doe 10 was asked, "[d]o you remember a meeting between Marc Appelbaum and Martha Sweeney at any time where she went back to his office?" Jane Doe 10 responded, "I'm not aware. This is news to me."

THE WITNESS: To the wall, so I was pretty much in an enclosed space once he sat down.

BY MR. WALTON:

Q: Understood. And so regarding your affidavit, you say: I was essentially stuck in a corner, with Mr. Appelbaum blocking my exit?

A: Uh-huh.

Q: Because it would have been you, Ms. Sweeney, Mr. Appelbaum, and you would have to go by him to get to the door?

A: Uh-huh.

Q: Okay. What transpired next?

A: He said to me -- and I don't even have to refer to my affidavit. He said to me: I don't know why we can't just get along.

Q: When he's saying we --

A: Me, he and I, because we had a little bit of a -- not a shouting match on the phone a couple of days before, but he was trying to pressure me. And I said: I'm not paying them today. I need to go over it with my boss. It's just not going to happen.

Q: These are the questions I wanted to ask you. Do you believe that the I wish we could just get along referred to you and he and the conversation you had on the telephone a couple of days before or, alternatively, do you believe the I wish we could all get along related to the Highway One --

A: The businesses and the town; I wasn't sure. At first I thought it was our conversation, which was a little heated. And I'm the kind of person you don't have to guess what I'm thinking. I say what I mean. So I had, you know, been a little forceful with him, because he was pushing me. And I don't get that a lot. So I thought he meant he and I. And then I thought to myself: Well, maybe he means the businesses and the town, because we're always at odds with each other and we

try to put together events to kind of soften that. And we have to get along with the town. This is my 39th year. So I've been doing this since before there was a town.

Q: Right.

A: And I've had Town Manager, Town Manager. I could name them all, Sam Fader, Bill Rutherford, the guy who -- Lieutenant Elliott, Diana Smith, and now Appelbaum. I mean I could name all the mayors. Each time I'm thinking: Oh, God, this is the worst one we've ever had. And it seems like it's hard to get along with them, because our interests are a little bit at odds. You know, we want to do whatever we want to do, and they don't want us to do any of it. So it could have been the town. I don't know. I don't know for sure.

Q: Okay. Tell me how the conversation with Mr. Appelbaum went from there.

A: I said, maybe it's just because our interests aren't the same, like I just said to you. I said: But I think we're really trying to get along. And at that point, I meant Alex and the town, and I was speaking of his interest. And he was creepy. He didn't really respond to me. He just sat there. And then he put his hand on my knee, and that made me very uncomfortable. I'm 61 year old. I'm not -- I've been married for 36 years. I am not used to, like, getting hit on by creepy, old Town Managers, honestly. And I wasn't sure that was happening. But I felt I was in an enclosed space. And it's been so long since I've been perved on by men. But over the years, I have been. I mean I was a bartender for years and put up with a lot of harassment. I worked for an attorney right out of college, and he perved on me. So I just was starting to look for my way out. And he said something about: If you play your cards right, you could maybe have my job one day.

Q: That's consistent with your affidavit. Personally, I find that to be a little bit odd. Was there any conversation about you taking over the town or anything like that prior to the conversation?

A: No. And I've had people call me and say: Can you get me a job with the town? And I go: I'm probably not the one you want to recommend you.

Q: So why do you think Mr. Appelbaum said that? Do you have any idea?

A: At that point, I thought he was coming on to me. And I mean we're the same age. And I found out at a later time that he and I are actually from the same exact neighborhood where we grew up. But I didn't know him, and he went to a different high school. But I just found that out after the fact. But at that point, I was done. I got up. I stood up, and he remained seated. I just had to get out of that corner, if I had to take him out on my way.

Q: Understood. Was that the end of the incident? Does that fairly encapsulate what –

A: Yes. I stood there, and I crowded him. He remained seated, but he finally had to give way. I mean we either did that, or we were going to wrestle. And I just said: Well, I'm busy. Have a good day. And I went back. So when I got back to the office, Alex and Megan and one of the other managers were in Alex's office. And he said: Did you pay the fees? And I said: Yes. And I told them my little, creepy thing. And so they've been calling him my boyfriend ever since then. . . .

We found Ms. Sweeney's statements to be credible and forthright during her interview. We did not have any sense that she was embellishing the story, nor did we have any sense of doubt in her testimony. Similarly, we did not get any sense that Mr. Appelbaum was covering anything up, and we also believed that he was being truthful regarding what he remembered about the incident. But the stories are so different that it is hard, if not impossible, to discern which of the two of the witnesses is more credible.

There is one fact that we have not been able to resolve, but it would go a long way in determining what story proved to be more credible. For Ms. Sweeney's account to be accurate, the chairs in Mr. Appelbaum's office would need to be on the back wall of the office across from Mr. Appelbaum's desk for her to be trapped, and the chairs could not be in the position where they sit now: on the right-hand side of his office. While it is clear that, on most days, the chairs remain on the right, there is no way to know if the chairs were on the back wall directly across the desk on the day in question on March 2016.

By the slimmest of margins, and largely due to the conviction of her in-person statement, we conclude that something happened in Mr. Appelbaum's office that day that made Ms. Sweeney uncomfortable. Whether or not Mr. Appelbaum's version or Ms. Sweeney's version of the incident is closest to accurate is something that cannot be resolved with any certainty.

X. CONCLUSION

This has been a difficult process. On the one hand, we find many of the allegations made by employees to be inflated and otherwise motivated by Mr. Appelbaum's management style and his management of what we perceived to be serious deficiencies within Town departments. On the other hand, Mr. Appelbaum's actions in 2012 and 2013 concerning Jane Doe 11 and Jane Doe 12 (and other actions) are worthy of discipline. In the end, there are overall programmatic deficiencies in the Town that the Commissioners will need to address going forward.

As always, we are available to answer any questions. And, if you or the Commissioners desire any additional information regarding the conclusions above, we are happy to provide further specific details upon request.

Sincerely,

/s/ Max B. Walton

Max B. Walton¹⁶³

MBW/sld
Enclosure

¹⁶³ We have conducted this investigation and prepared this report in as prompt of a timeframe as we were able under the circumstances. I would like to thank my colleagues, Aaron Shapiro, Lauren DeLuca, and Kyle Gay for their dedication assisting me in providing this report in a very prompt fashion.