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JUDICIAL DISPUTE RESOLUTION, LLC

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9 In re the Matter of:

10 PORT OF KENNEWICK,  
11 and

12 PORT COMMISSIONER DON BARNES.

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**DECISION ON  
*RECOMMENDED ACTION***

THIS MATTER comes before the Neutral, Judge Paris K. Kallas, ret., upon Port Commissioner Don Barnes' request for review of the *Recommended Action of the Port of Kennewick*.

A public review hearing was held on December 4, 2020, at which counsel presented oral argument. In addition, the parties submitted the following documents:

- Investigation File prepared by attorney Tara Parker;
- The Port of Kennewick's Prehearing Memorandum; and
- Commissioner Barnes' Pre-hearing Brief.

Having considered the foregoing, the Neutral hereby renders the following decision.

1           **I. Procedural History**

2           The Port of Kennewick (the Port) is a port district formed under RCW Chapter 35.  
3           The Port is governed by a Commission authorized under RCW 53.12.010. The Port has three  
4           Commissioners and a staff of 12. The Port has adopted Port of Kennewick Commission Rules  
5           of Policy and Procedure (Port Rules).

6           On March 25, 2019, Commissioner Skip Novakovich filed a Complaint against  
7           Commissioners Tom Moak<sup>1</sup> and Don Barnes. IR 106-113. (Initially, the Complaint was filed  
8           anonymously.) The Complaint alleges that both Commissioners Moak and Barnes violated  
9           the State Open Public Meetings Act, violated certain Port Rules, and subjected the Port CEO  
10          to harassment, retaliation, and a hostile work environment. IR 106-109. The Complaint  
11          requests relief, including that “Commissioners Moak and Barnes be asked to resign their  
12          Commissioner seats and be declared ineligible to ever hold any elected seat.” IR 109.

13          Pursuant to Rule 5.4, the Port appointed attorney Tara Parker to investigate the  
14          Complaint. Attorney Parker interviewed the three Port Commissioners and six of the 12 Port  
15          staff members. Attorney Parker also obtained numerous documents from the Port, including  
16          emails, Commission meeting minutes, and meeting audio recordings.

17          On June 18, 2019, Attorney Parker completed her report and forwarded it to Port  
18          counsel. IR 1299, 1395-1411. On June 26, 2019, Port counsel asked Parker to investigate  
19          another alleged violation in which Commissioner Barnes contacted the State Auditor’s Office.

20          On August 2, 2019, Attorney Parker issued her updated investigation report. IR 635.  
21          The investigation exonerated Commissioners Moak and Barnes on multiple complaints of  
22          misconduct. Attorney Parker concluded that neither Commissioner violated the Open Public  
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25          <sup>1</sup> At an August 13, 2019 Port Commission Meeting, Port counsel presented the Report of Investigation and  
26          *Recommended Action*. Commissioner Moak accepted Port counsel’s *Recommended Action*. Accordingly,  
            this Decision addresses neither the investigation of nor conclusions reached regarding the complaints against  
            Commissioner Moak.

1 Meetings Act. Nor did either Commissioner violate the Port Rules in their directives to staff  
2 regarding Resolution 2019-02.

3         Regarding Commissioner Barnes, Attorney Parker concluded that he violated Port  
4 Rule 12.3 by directly contacting one of the Port's consultants, DPZ, and by directly contacting  
5 the State Auditor's Office. She also found that Commissioner Barnes exhibited hostility  
6 against the Port CEO, Tim Arntzen, in violation of Port Rule 3.6.

7         Based upon Attorney Parker's report, Port counsel issued *Recommended Action*  
8 against Commissioner Barnes, including formal public censure and satisfactory completion  
9 of training covering various topics. IR 1391-94. The *Recommended Action* recommends that  
10 Commissioner Barnes personally pay for all costs and fees associated with the training.  
11 Furthermore, the *Recommended Action* recommends that Commissioner Barnes participate in  
12 cooperative team building activities and trainings with the Port CEO and staff. Under the  
13 *Recommended Action*, all of the foregoing would also be published in the local newspaper.  
14 IR 1391-94.

15         Commissioner Barnes requested a review of the *Recommended Action*.

16         The Port Rules govern this review process. The original Port Rules were adopted on  
17 February 11, 2011. Because all three Commissioners were involved in the March 25, 2019  
18 complaint (a situation not addressed in the original Rules), Port Rule 5 was revised and  
19 adopted in June 2019.

20         The Port Rules provide for a hearing and decision upon the recommended action. If  
21 the complaint received is made against more than one Commissioner, as in this case, the  
22 determination and recommended action of Port counsel "shall be submitted to a mutually  
23 agreeable neutral[.]" The neutral "shall promptly hear, consider and issue a decision regarding  
24 the recommended action." Finally, the neutral "shall determine the hearing process and shall  
25 issue a decision within 30 days of the hearing." Rule 5.7.

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2       The parties have disputed the scope of the review. The parties have fully briefed the  
3 various disputes and several Orders have been entered that define the scope. Attorney  
4 Parker's investigation report, of over 1,460 pages, has been produced and provided to  
5 Commissioner Barnes.

6       On December 4, 2020, a public hearing was conducted, and counsel for Commissioner  
7 Barnes and counsel for the Port of Kennewick presented oral argument. This Decision  
8 follows.

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10      **II. Factual Background**

11     In light of the voluminous record and the public nature of this review hearing, the  
12 following detailed summary is presented.

13     The events at issue arise from the January 22, 2019 Regular Commission meeting, at  
14 which Port staff presented Resolution 2019-02. The Resolution would authorize releasing the  
15 buy-back provision in a Purchase and Sale Agreement of a 2004 sale of property by the Port  
16 to Jerry Ivy. IR 295-303, 1413. Under the buy-back clause, the Port could repurchase the Ivy  
17 property if Mr. Ivy did not develop the property within 18 months of the sale. IR 81-91, 1413.

18     At the January 22 Commission Meeting, Port staff reported that Mr. Ivy requested that  
19 the Port release the buy-back option so that he could proceed with a pending sale. Staff also  
20 indicated that the current value of Ivy property exceeded \$1M and advised there was no  
21 strategic reason for the Port to repurchase the property. IR 299.

22     The Ivy property is adjacent to Vista Field, an important development project on  
23 which the Port has been working since 2013. IR 299, 1414. Commissioner Novakovich stated  
24 he was in favor of releasing the buy-back option. IR 1414.

25     Commissioners Moak and Barnes, however, requested additional information before  
26 making a decision. Both stated that the Port has an interest in determining if and how the

1 proposed action could potentially impact the Vista Field project. IR 300, 1414. As  
2 Commissioner Barnes stated, “the Port has a vested interest in what happens on this property.”  
3 IR 300, 1414.

4 The Regular Commission Meeting of February 12, 2019 was cancelled due to  
5 weather. Thus, a Special Commission Meeting to discuss the Ivy property buy-back was  
6 scheduled for February 19, 2019. In the interim, Port counsel prepared a memorandum  
7 regarding her opinion about whether the Port should exercise or relinquish the buy-back  
8 option. IR 79-80, 805-06.

9 Also in the interim, Commissioner Barnes contacted DPZ, the Port’s Vista Field  
10 development consultant, to inquire whether DPZ had an opinion on whether the Port should  
11 repurchase the Ivy property. IR 122. Commissioner Barnes contacted DPZ directly, without  
12 alerting the CEO or Port staff.

13 On February 18, 2019, Port staff contacted the CEO and advised that DPZ  
14 representatives contacted Port staff. DPZ relayed that Commissioner Barnes had called DPZ  
15 and “asked whether they thought it would be wise for the [P]ort to purchase the Ivy parcel,  
16 which is adjacent to Vista Field.” IR 122.

17 On February 19, 2019, the Port held a Special Meeting to further discuss the Ivy  
18 property buy-back. There was significant debate between Port staff and Commissioner  
19 Barnes regarding the strategic value (of lack thereof) of the Ivy property in relation to the  
20 Vista Field project. IR 409-416.

21 On February 21, 2019, Commissioner Barnes called CEO Arntzen. According to  
22 Commissioner Barnes, he made the phone call while on vacation and in an effort to “broker  
23 some peace.” IR 24. Instead, the discussion became “really animated.” IR 24. According to  
24 the CEO, Commissioner Barnes accused the CEO of committing fraud by intentionally  
25 withholding information regarding the Ivy property buy-back option. IR 121. CEO Arntzen  
26 responded that he “highly resented” and was outraged by the accusation. IR 121.

1 Commissioner Barnes relates that the CEO accused him of “being after his job” and the CEO  
2 challenged Commissioner Barnes to “f-ing bring it on.” IR 24. Commissioner Barnes then  
3 “backed down” but adhered to his position that the CEO failed to share known and pertinent  
4 facts with the Commissioners. IR 121.

5 On February 25, 2019, CEO Arntzen and Commissioner Barnes met to further discuss  
6 the Ivy property buy-back. IR 93-97. Commissioner Barnes voiced his frustration about how  
7 the issue was presented to the Commissioners: “My point is that I was shocked by the way  
8 this issue was brought to the Commission. I didn’t feel the information presented was enough  
9 for a \$1.7M decision.” IR 95. Absent sufficient information, Commissioner Barnes “felt like  
10 it was a rubber stamp – just sign here.” IR 95. CEO Arntzen, in turn, voiced frustration with  
11 the Commissioner’s questions and inquiries, telling the Commissioner “you’re acting as  
12 realtor, not Commissioner.” IR 94. He also conveyed that Commissioner Barnes appeared  
13 to “want way more information on real estate than the other two commissioners.” IR 95. He  
14 conveyed his opinion that Commissioner Barnes acted unethically by contacting DPZ. The  
15 Commissioner responded that he contacted DPZ because he wanted information, to which the  
16 CEO responded: “that’s why I’m here. I can call DPZ and relay information to you.” IR 95.  
17 The CEO conveyed that Commissioner Barnes’ inquiries put the CEO in a tough spot and the  
18 CEO perceived a conflict between himself and Commissioners Barnes and Moak. IR 95.  
19 Commissioner Barnes assured the CEO that he was “not trying to drill down to details and I  
20 wanted to stay at [the] 30,000 level.” IR 94. Commissioner Barnes also emphasized that he  
21 was not “gunning” for the CEO and that he did not have a conflict with the CEO. Rather, he  
22 was motivated by “trying to do my best” for the Port. IR 96.

23 Commissioner Barnes later explained to Attorney Parker that it was not in the Port’s  
24 best interests to “simply ‘rubber stamp’” release of the buy-back option without exploring  
25 whether the Port could benefit from the repurchase. IR 1415. He further explained that he  
26 was “most bothered” by the fact that staff did not inform or remind the Commission of the

1 buy-back option during the initial planning for Vista Field in 2013. Commissioner Barnes  
2 “expressed a lot of frustration toward the [Port] CEO for what [Barnes] considered to be a  
3 ‘defiant’ response to the Commissioners’ questions.” IR 1415.

4 At the February 26, 2019 Regular Commission meeting, Port counsel presented a  
5 more detailed explanation of the Port’s options (and risks) regarding exercising or  
6 relinquishing the buy-buy provision. IR 313-321. Commissioner Moak adhered to his earlier  
7 position that he was not currently prepared to make a decision. IR 319. As he noted, the  
8 deadline had been extended and he would like to wait until receiving certain bids on the Vista  
9 Field project.

10 Both the CEO and Commissioner Barnes offered public apologies to each other for  
11 misunderstandings and miscommunications regarding the Ivy property and its relationship to  
12 the Vista Field project. The meeting minutes described Commissioner Barnes’ position, as  
13 well as his public apology:

14 Commissioner Barnes offered an apology to [the CEO] and to staff regarding the Ivy  
15 real estate matter, stating the issue caught him by surprise and he felt he didn’t have  
16 enough information and overreacted. He acknowledged it was out of line to call DPZ,  
17 and he apologized for that. As a commissioner, he stated he wants the best possible  
18 redevelopment at Vista Field. His intent is to do the best job that he can for the Port  
19 as commissioner; as he has for the past 6 ½ years. He understands that we are in a  
20 challenging bid environment; and even if we get favorable bid numbers on Vista  
Field, he believes it would be a stretch to find the resources to make a purchase  
happen. If the timing or a lot of other things had been different, maybe; but it’s hard  
to say: would have, could have, should have. He feels he overreacted and at this  
point would consider relinquishing it [the buy-back provision].

21 IR 319.

22 The meeting minutes also document the CEO’s comments, as well as his public  
23 apology for previously failing to provide sufficient information and failing to appreciate the  
24 potential significance of the buy-back option:

25 [The CEO] stated he appreciated the Commissioner[‘s] comments and acknowledged  
26 that as a manager he made an assumption that this was not a significant matter and for  
that he apologized to the Commission. He stated as manager he tries to guess what

1           matters would be of importance to [the] Commission and which are secondary in  
2           nature; his mea culpa is that he guessed wrong on this matter. Since Commissioner  
3           Moak suggested waiting until the March 12 meeting, and since Mr. Ellsworth said  
4           they are willing to push things back a little bit, Mr. Arntzen offered to make notes,  
5           visit with his staff, and with legal counsel, and others, then compile a list of issues that  
6           the Commission might wish to consider. He offered to put together a summary memo  
7           so that the Commissioners might have a full discussion on March 12. Mr. Arntzen  
8           stated again that he appreciated the Commissioners[‘s] earlier comments; that this has  
9           been an important matter, he apologized again for misinterpreting the potential  
10          significance of the piece of property to the Port.  
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12          IR 319.

13          The Ivy property buy-back option was addressed again at the March 12, 2019 Regular  
14          Commission Meeting. IR 330-345. At this meeting, the CEO presented an extensive factual  
15          background regarding the buy-back option and its relation to the Vista Field project. IR 340.  
16          His presentation included his assessment that the transaction price would be approximately  
17          \$1.8M and the Port faced liability if it decided to exercise the buy-back option. IR 340. He  
18          also elaborated on the purchaser and the plans for the property, should the Port relinquish the  
19          buy-back option. IR 340-41.

20          Commissioner Barnes voiced frustration with “how we got here” and the lack of  
21          information previously provided, as reflected in the meeting minutes:

22          [M]any of the elements from this discussion have been very unpleasant; however, he  
23          hopes that it can provide some lessons moving forward. Commissioner Barnes  
24          inquired why a buyback clause is standard in the Port’s PSA if it has never been  
25          exercised. Commissioner Barnes stated the clause should be revisited and perhaps  
26          removed, because there will be many PSA’s in Vista Field.

27          IR 342. Nonetheless, having been provided with more complete information, Commissioner  
28          Barnes voted to relinquish the Ivy property buy-back option. So did Commissioners Moak  
29          and Novakovich and Resolution 2019-20 was adopted. IR 342-43, 347.

30          Approximately one week later, Commissioner Barnes contacted Port counsel and  
31          suggested that counsel could arrange a “mediation” between himself and the CEO. IR 1416.  
32          The CEO rejected the offer, contending that Commissioner Barnes “was entirely at fault.” IR  
33          15, 1416.

1           Approximately one week later, the Complaint was filed. Attorney Parker was hired  
2 and the investigation began. As noted above, Attorney Parker completed her report in mid  
3 June, 2019. On June 26, 2019, Port counsel asked Parker to investigate another alleged  
4 violation of Port policy by Commissioner Barnes.

5           Specifically, Commissioner Barnes contacted Port counsel in June and stated that he  
6 had called the Washington State Auditor's Office (SAO). IR 131-132, 741-43. He explained  
7 that he contacted the State Auditor to ask about municipal accounting practices for real estate  
8 transactions with buy-back clauses. He further explained that on June 21, 2019, he received  
9 a return phone call in which the SAO staff member stated there are no such accounting policies  
10 to track buy-back clauses. Commissioner Barnes asked Port counsel if his inquiry violated  
11 any Port rules and whether he needed to disclose the contact at the next Commission meeting.  
12 Counsel advised that the inquiry likely violated the Port Rules and that the Commissioner was  
13 required to disclose it at the next meeting.

14           At the June 25, 2019 Commission meeting, Commissioner Barnes read the following  
15 statement, which was recorded in the meeting minutes:

16           Commissioner Barnes disclosed that earlier this month, that he initiated an individual  
17 communication with the State Auditors for the purposes of inquiring about municipal  
accounting practices for real estate transactions with buy-back clauses.

18           [SAO staff] returned Commissioner Barnes's call last Friday, June 21, 2019, to say  
19 there are no accounting practices for tracking buy-back clauses. Commissioner  
Barnes stated that this is simply an individual inquiry that he felt he could make under  
20 provision 12.3 of our Rules of Policy and Procedure. Commissioner Barnes's  
intention was to make the inquiry looking forward to the future, and the many real  
estate transactions anticipated at the Port, especially at Vista Field. Commissioner  
Barnes made the inquiry to try [to] avoid the problems of the past and not make any  
22 new problems going forward.

23           IR 133, 146.

24           **III. Standard of Review**

25           The Port of Kennewick Commissioners are public servants who agree to be held  
26 accountable by numerous standards, including the Port's Rules. The Port Rules provide that

1       “if any person believes that a Commissioner or Commissioners have engaged in *misconduct*  
2       the Executive Director shall investigate consistent with Section 5.3 and report to the  
3       Commission.” Rule 5.2 (emphasis added).

4              If an investigation is warranted, the Executive Director is required to recuse himself  
5       from the process and delegate all further steps to Port counsel. Rule 5.4. The Port Rules  
6       require that when investigating and evaluating complaints against a Commissioner, Port  
7       counsel “shall presume” that the “Commissioner(s) acted ethically and shall determine that  
8       an act of professional misconduct has occurred only upon a finding of substantial evidence of  
9       such misconduct.” Rule 5.4. “Substantial evidence” is “ a sufficient quantity of evidence to  
10      persuade a fair-minded person of the truth or correctness of the order.”<sup>2</sup> If Port counsel “finds  
11      misconduct and the complaint substantiated, a report to the Executive Director and the  
12      Commission shall set forth the basis for the determination and a recommendation action[.]”  
13      Rule 5.5.

14              The Port rules do not define the terms “misconduct” or “professional misconduct.”  
15      Misconduct of public officers is defined, however, in other settings and those definitions  
16      provide guidance in this matter. Such misconduct includes: improperly using public office  
17      for financial gain; making a false statement in an official report; and misappropriating public  
18      funds.<sup>3</sup>

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20              **IV. There is Not Substantial Evidence that Commissioner Barnes committed  
21              sanctionable misconduct by contacting the Port’s consultant or the State  
22              Auditor’s Office**

23              Attorney Parker concluded that Commissioner Barnes violated Port Rules when he  
24      called DPZ and the SAO regarding business matters. IR 1426. Based on this conclusion, Port  
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<sup>2</sup> *Cornelius v. Washington Department of Ecology*, 182 Wn.2d 574, 607 (2015).

<sup>3</sup> RCW 42.20.020, .040, and .070.

1 Counsel recommends that Commissioner Barnes receive a formal censure in the form of a  
2 Commission Resolution, that he complete certain training at his own expense, and that the  
3 sanctions be published in the Tri-City Herald. IR 1392.

4 It is undisputed that Commissioner Barnes contacted both the Port consultant, DPZ,  
5 and the SAO. But whether these contacts violate the Port Rules is less than clear because the  
6 Rules themselves are not clear. At issue is Rule 12.3<sup>4</sup>, which provides, in part, that  
7 “Commissioners individually may communicate directly with Port employees or contractors  
8 for the purpose of inquiry only. Commissioners shall, on business matters, deal with staff  
9 through the Executive Director.”

10 The Rule appears to define internal governance by dictating when a Commissioner  
11 may - and may not - directly contact staff. Direct contact with either “Port employees or  
12 contractors” is allowed “for purpose of inquiry only.” By contrast, the Rule prohibits a  
13 Commissioner from contacting staff (no mention of contractors) directly “on business  
14 matters.” Instead, “on business matters” the Rule mandates that a Commissioner’s  
15 communication with staff is restricted to communication through the Executive Director. In  
16 short, it is not clear that the Rule is intended to restrict a Commissioner’s inquiries outside of  
17 internal governance protocol. Even if so intended, the Rule does not define the difference  
18 between an “inquiry” and “business matters.” Is the Rule violated if a Commissioner inquires  
19 of staff regarding a business matter? Or is the Rule violated only if a Commissioner directly  
20 contacts staff to conduct a business matter? The Rule’s lack of clarity must be kept in mind  
21 before finding that a Commissioner commits misconduct based on making an inquiry, even  
22 an inquiry “on business matters.”

23 Again, it is not clear that Commissioner Barnes violated Port Rules when he contacted  
24 DPZ or the State Auditor’s Office to make inquiries on business matters and then failed to  
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26 <sup>4</sup> While the Complaint alleged violations of other Rules, including Rule 13.2 and 13.3, Attorney Parker’s conclusions address only Rule 12.3 in concluding that the Commissioner’s inquiries violated Port Rules.

1 immediately report the inquiries. But even if he violated the Port Rules, the question remains  
2 whether substantial evidence overcomes the presumption that the Commissioner's actions  
3 were ethical and that he acted in the Port's best interest in making the contacts.

4       Regarding his inquiry to DPZ, Attorney Parker did not contact DPZ to confirm the  
5 details of the inquiry. Nonetheless, it appears undisputed that Commissioner Barnes asked  
6 DPZ if it "would be wise" for the Port to exercise the Ivy property buy-back. IR 122.

7       While the Commissioner may have breached internal governance protocol by directly  
8 contacting DPZ to make an inquiry, he did so to obtain information that he believed was not  
9 forthcoming from Port staff on a key Port policy decision. As Commissioner Barnes later  
10 explained to Attorney Parker, it was not in the Port's best interests to "simply 'rubber stamp'"  
11 release of the buy-back option without exploring whether the Port could benefit from the  
12 repurchase. IR 1415. There is no evidence that the Commissioner did anything but make the  
13 inquiry. He did not direct DPZ to take any action, undergo any tasks, or change the scope of  
14 their consulting work with the Port.

15       Regarding Commissioner Barnes' inquiry to the State Auditor's Office, the Port Rules  
16 are silent on whether it is inappropriate for a Commissioner to directly contact a State agency  
17 with an inquiry. Nor does the evidence show that Commissioner Barnes did anything beyond  
18 asking a generic accounting question.<sup>5</sup> There is no evidence that Commissioner Barnes  
19 attempted to conduct Port business during the contact with SAO staff.

20       For all these reasons, substantial evidence does not overcome the presumption that  
21 Commissioner Barnes acted ethically and in the Port's best interests when he contacted both  
22 DPZ and the State Auditor's Office. Accordingly, Commissioner Barnes did not commit  
23 sanctionable misconduct.

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<sup>5</sup> The record does not indicate that Attorney Parker contacted the State Auditor's Office during the investigation.

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2       **V. There is Not Substantial Evidence that Commissioner Barnes committed**  
**sanctionable misconduct in his Interactions with the Port CEO**

3       Attorney Parker made no conclusion regarding the Complaint's allegations that  
4 Commissioner Barnes either harassed, threatened, or retaliated against the CEO. She did,  
5 however, conclude that the investigation "does **not** support a finding that Commissioner  
6 Barnes subjected the CEO to hostile treatment on the basis of a protected status, as is required  
7 to make a *prima facie* claim under the WLAD, RCW 49.60.180." IR 1424 (emphasis added).

8       Attorney Parker concluded only that Commissioner Barnes "exhibited repeated,  
9 significant hostility<sup>6</sup> – in public and private – against the CEO" in violation of Rules 3.6 and  
10 3.12. IR 1424. Based on this conclusion, Port Counsel recommended that Commissioner  
11 Barnes receive a formal censure in the form of a Commission Resolution, that he complete  
12 certain training at his own expense, and that the sanctions be published in the Tri-City Herald.

13       The primary Rule at issue is Rule 3.6, which provides that Commissioners "shall  
14 conduct themselves with civility and respect at all times with one another, with staff, and with  
15 members of the public." The Rule also requires that as "fiduciaries of the Port,  
16 Commissioners shall make decisions on the basis of public policy and shall demonstrate  
17 undivided loyalty to the interests of [the] Port and its taxpayers."

18       It is undisputed that Commissioner Barnes was frustrated by and concerned with the  
19 CEO's initial presentation of the Ivy property buy-back option. From his perspective, the Ivy  
20 property buy-back was on placed on the January 22, 2019 agenda as a minor matter and the  
21 Commissioners were expected to simply "rubber stamp" the recommendation that the buy-  
22 back option be relinquished.

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25       <sup>6</sup> In her final conclusions, Attorney Parker states that Commissioner Barnes "did create a hostile work  
26 environment for Port CEO in violation of Port Policies." IR 1427. Her earlier findings, however, confirm that  
she does not find a "hostile work environment" as that term is used in employment discrimination law. See IR  
1412-1413.

1           As Commissioner Barnes later explained to Attorney Parker, he was “most bothered”  
2 by the fact that staff did not inform or remind the Commission of the buy-back option in 2013,  
3 during the initial planning for the Vista Field project. Given the Ivy property’s proximity to  
4 the Vista Field project, and the significance of the Vista Field project, Commissioner Barnes  
5 was troubled by the perception that the CEO expected the Commissioners to simply “rubber  
6 stamp” relinquishing the buy-back option. Commissioner Barnes “expressed a lot of  
7 frustration toward the [Port] CEO for what [Barnes] considered to be a ‘defiant’ response to  
8 the Commissioners’ questions.” IR 1415.

9           Tension between the CEO and Commissioner Barnes escalated and both exchanged  
10 harsh, even “hostile” words (remembering that “hostile” means “unfriendly” or  
11 “antagonistic.”)<sup>7</sup> But the “hostile” communications must be viewed in context before one  
12 may conclude that the communications constitute sanctionable misconduct by a public official  
13 charged first and foremost with “undivided loyalty to the interests of [the] Port and its  
14 taxpayers.”

15           Even the CEO acknowledges that he viewed the Ivy property buy-back as a minor  
16 matter and that he initially presented it as such. The CEO subsequently apologized for this  
17 judgment call. Commissioner Barnes also publicly apologized for his conduct. He also  
18 reached out to the CEO and tried to “broker peace” by suggesting a mediation. And once  
19 additional information was provided, all three Commissioners unanimously voted to  
20 relinquish the buy-back option, putting an end to a difficult and intense chapter.

21           When viewed in context, the intense and even “hostile” communication reflects  
22 serious disagreement about a significant policy decision. The communication does not  
23 constitute substantial evidence to overcome the presumption that Commissioner Barnes’  
24 frustration with the CEO stemmed from the Commissioner’s loyalty to the Port’s best interests  
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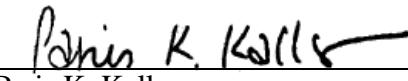
26           <sup>7</sup> *The American Heritage Dictionary of the English Language.*

1 and the need for informed decision making on a significant policy matter. Accordingly,  
2 Commissioner Barnes did not commit sanctionable misconduct.

3           **VI. Conclusion**

4           Upon consideration of the arguments presented by counsel, and based upon review  
5 of the entire investigation report, and for all the reasons stated herein, there is not substantial  
6 evidence in the record sufficient to overcome the presumption that Commissioner Barnes  
7 acted ethically or to conclude that Commissioner Barnes committed sanctionable misconduct.  
8 Accordingly, the Complaint against Commissioner Barnes is unsubstantiated in its entirety  
9 and no sanctions shall be applied.

10           Dated this 31<sup>st</sup> day of December 2020.

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13           Paris K. Kallas  
14           Retired Superior Court Judge  
15           Review Hearing Neutral Decision Maker  
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