

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Law Court Docket No. Ken-23-393

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PATRICK GORDON  
Petitioner/Appellant

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES  
Respondent/Appellee

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**BRIEF OF RESPONDENT/APPELLEE**  
**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

On appeal from Decision and Order of the Kennebec County Superior Court

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## INTRODUCTION

Attorneys who wish to accept cases to represent indigent people in Maine must comply with the Maine Commission on Indigent Legal Services' ("Commission") rules. Attorney Patrick Gordon violated a Commission rule when he failed to comply with a Commission investigation. As a result, the Commission's Executive Director suspended Attorney Gordon's eligibility to accept cases to represent indigent people. After an adjudicatory hearing, the Commission affirmed this decision. The Commission's administrative review and appeal process of the suspension decision was conducted properly and without bias.

This Court should not consider any of the legal issues belatedly raised by Attorney Gordon as he failed to argue any in the Superior Court. Should this Court consider any of legal issues raised in Attorney Gordon's appellate brief, the Commission's Order should be affirmed. Sufficient, competent record evidence supports the Commission's finding that Attorney Gordon failed to comply with a Commission investigation. The Commission did not abuse its discretion when, as a result, it affirmed the Executive Director's decision to suspend Attorney Gordon's eligibility to accept cases to represent indigent people until he complies with the Commission investigation. This Court should affirm the Commission's Order.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### Statutory Background of the Commission

The Commission is an independent commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations. 4 M.R.S. § 1801 (2023). The Commission is tasked with providing a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner. *Id.*

The Commission is responsible for developing standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services. 4 M.R.S. § 1804(2)(G) (2023). To that end, the Commission has adopted rules applicable to all attorneys who wish to be deemed eligible by the Commission to represent indigent people. *See* 94-649 C.M.R. chs. 2 (2010) and 3 (2016).<sup>1</sup> (Amended Appendix (“Amend. A.”) 20-22.)

Any attorney wishing to accept case assignments from the Commission, to serve as contract counsel, or to otherwise be approved by the Commission to accept assignments to represent indigent people must register annually with

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<sup>1</sup> Available at <https://www.maine.gov/sos/cec/rules/90/chaps90-.htm> (last visited February 25, 2024).

the Commission. 94-649 C.M.R. ch. 2, § 2 (2010) (Amend. A. 20-21; EH 370-72.)<sup>2</sup> Attorneys who meet the Commission’s minimum eligibility requirements are placed on case type and court location specific rosters. *See* 94-649 C.M.R. ch. 3.

Rostered attorneys must comply with “any Commission investigation of complaints, billing discrepancies, or other information that, in the view of the Executive Director, concerns the question of whether the attorney is fit to remain on the roster.” 94-649 C.M.R. ch. 2, § 2(2) (Amend. A. 20-21; EH 370-71.) Each attorney, by virtue of submitting an initial application to be deemed eligible by the Commission to represent indigent people, agrees to cooperate with Commission investigations. (EH 43, 211.)

The Commission’s Executive Director administers and coordinates the delivery of indigent legal services and supervises compliance with Commission standards. 4 M.R.S. § 1805(3) (2024). The Executive Director may remove indefinitely, suspend an attorney from the roster completely, or suspend an attorney from the roster for certain case types and court locations for failure to comply with any Commission Rule. 94-649 C.M.R. ch. 2, § 6 (2010) (Amend. A.

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<sup>2</sup> The administrative record is organized in three separate binders, each with unique Bates number prefixes (FA for Final Agency Action, EH for Evidence at Hearing, and PF for Procedural Filings) that appear on the top lefthand side of each page. For clarity, citations to the administrative record will use those prefixes rather than “R.”

22; EH 372; Ex. 40.) The Executive Director’s decision to remove or suspend an attorney may be appealed to the full Commission. 4 M.R.S. § 1804(3)(J) (2024); 94-649 C.M.R. ch. 201 (2011). (EH 373-79.) All decisions of the Commission, including decisions on appeals by attorneys aggrieved by a decision of the Executive Director, constitute final agency action. 4 M.R.S. § 1804(3)(J).

### **Factual and Procedural Background**

Attorney Gordon first applied to be deemed eligible by the Commission to accept indigent case assignments in 2010. (EH 42, 210.) On his initial application, Attorney Gordon affirmed as follows, “I also agree to cooperate with Commission monitoring, performance evaluation, and investigation of complaints related to my work on assigned cases.” (EH 211.)

#### **A. Investigation**

On January 25, 2021, an attorney assigned to represent a former client of Attorney Gordon (“Former Client”) in a post-conviction review case contacted Commission Deputy Executive Director Eleanor Maciag and reported possible concerns related to a voucher<sup>3</sup> that Attorney Gordon submitted to the Commission for payment. (EH 50, 219-20.) Deputy Director Maciag called the

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<sup>3</sup> The Commission uses a case management and billing software called defenderData. (EH 82.) An attorney, or someone working on behalf of an attorney, makes entries into the program to indicate how much time an attorney spent on the case. (*Id.*) When the attorney, or person working on behalf of the attorney, submits the time to the Commission to request payment, a voucher is generated, which is reviewed by the Commission. (*Id.*)



Commission's then-Executive Director Justin Andrus ("Executive Director")<sup>4</sup> to inform him of what the post-conviction review attorney had relayed to her. (EH 65.) Based on that information, the Executive Director began an investigation. (EH 79-80.)

The Executive Director reviewed information submitted to Deputy Director Maciag by the post-conviction review attorney, information received directly from the post-conviction review attorney, and spoke with the post-conviction review attorney. (EH 79, 87-88.) On February 12, 2021, the Executive Director wrote to Attorney Gordon, informed him of the existence of a complaint and Commission investigation, and requested that Attorney Gordon provide the Commission with certain information and documents. (EH 293-94.)

i. *Request for Documents*

As part of his investigation, the Executive Director requested from Attorney Gordon a complete copy of all client file material related to the Former Client for any matter in which Attorney Gordon provided him with legal services. (EH 293-94.) Attorney Gordon was asked to provide, without

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<sup>4</sup> Justin Andrus was named Interim Executive Director of the Commission in January of 2021. (EH 216-18.) He was subsequently named permanent Executive Director. (FA 6.) When Executive Director Andrus was acting in an interim capacity, he was vested with all of the powers of the office of the Executive Director, just for a finite time period. (EH 30.) Executive Director Andrus served in the position until May 19, 2023.

limitation, all internal and external communications, all notes and memoranda, and all internal billing documents of any kind, including from his Clio database concerning the Former Client. (*Id.*) The Executive Director subsequently clarified that his request for client file materials was limited to matters in which Attorney Gordon was appointed to represent the Former Client or matters in which another attorney was appointed to represent the Former Client, but Attorney Gordon provided legal services to the Former Client. (EH 304-06.) In this communication, the Executive Director also requested the file retention policy in place at the time that Attorney Gordon represented his Former Client and the policy that was currently in place. (*Id.*)

In response to concerns that Attorney Gordon expressed regarding his obligations under the Maine Rules of Professional Conduct, the Executive Director offered him the option of providing only those documents that Attorney Gordon believed he could provide under those rules, with appropriate, limited redactions. (EH 321.)

Attorney Gordon acknowledged that he had access to responsive documents, and his counsel stated that Attorney Gordon would provide the Executive Director with non-privileged documents. (EH 125, 326-27, 338.) Despite these representations, Attorney Gordon did not provide the Commission with any documents during the investigation. (EH 127.)

ii. *Requests for Information*

The Executive Director also requested the following information from Attorney Gordon as part of the investigation:

1. If time for services performed on behalf of the Former Client by paralegals was billed to the Commission as having been performed by attorneys, please explain why.
2. Confirmation that the matter involving the Former Client was resolved through a bench trial. If so, an explanation as to why Attorney Gordon's voucher note indicated that it was a multiple day jury trial.
3. Each date on which Attorney Gordon personally met with the Former Client, including the location.

(EH 293-94.) Attorney Gordon provided a response to the first two questions but failed to provide the Executive Director with a complete account of the dates and locations of each meeting with his Former Client. (EH 97-99, 174, 300-01.)

The Executive Director followed up with Attorney Gordon to request more complete responses to each of his initial questions. (EH 304-06.) The Executive Director also requested the following additional information:

1. Confirmation that all of the time specified on the voucher submitted to the Commission as to the Former Client was performed by the person specified or specification of any time that was improperly billed.

2. An explanation of what happened to a file regarding the Former Client referenced in a letter from Attorney Gordon to the York County Superior Court.
3. An explanation as to why Attorney Gordon had not complied with a court order to furnish a copy of any and all client files regarding the Former Client to the post-conviction review attorney or otherwise provide the Former Client with his files.

*(Id.)*

After Attorney Gordon retained counsel, the Executive Director reiterated the issues being investigated and requested that if Attorney Gordon could not produce any of the requested information or documents, he explain what he had done to obtain the information and the dates on which he took those steps. (EH 321.) The Executive Director additionally asked Attorney Gordon to provide a release to allow him to speak with any person that Attorney Gordon determined may hold responsive information so that the Executive Director could speak to them about obtaining that information. *(Id.)*

Attorney Gordon declined to provide additional responses to the Executive Director's first set of requests for information. (EH 326-27.) Attorney Gordon did respond to the Executive Director's additional, follow-up questions, explaining that he did not have access to the voucher that was submitted to the Commission and that his office staff generates Commission vouchers from information in an internal billing system. *(Id.)* Attorney Gordon also claimed

that he did not know what happened to the file referenced in his letter to the court and that he failed to provide the client files at issue to the post-conviction review attorney because he did not realize that she wanted those files. (*Id.*)

The Commission's investigation of Attorney Gordon spanned more than four months. (EH 293, 339.) The Executive Director provided Attorney Gordon numerous extensions of time to respond. (EH 96, 105, 110-12.) Despite these extensions, Attorney Gordon failed to provide a single responsive document, redacted or otherwise; failed to provide a complete list of the dates and locations he had met with his Former Client; and failed to provide appropriate releases so that the Commission could pursue obtaining any documents not in his possession. (EH. 97-99, 122, 124, 127, 137, 174.)

On June 22, 2021, the Executive Director issued a decision suspending Attorney Gordon from Commission rosters based on his non-compliance with a Commission investigation. (EH 339-40.)

B. Commission Administrative Review and Appeal Process

On July 21, 2021, Attorney Gordon appealed the decision of the Executive Director pursuant to 94-649 C.M.R. ch. 201, § 4(1)(B) (2011). (EH 344-60 and 373-79.) Commissioner Roger J. Katz served as the proceeding's Presiding Officer. (FA 4; EH 3.)

On March 17, 2022, the Presiding Officer held an adjudicatory hearing via the videoconferencing platform Zoom. (EH. 1, 3.) Attorney Gordon declined to offer any exhibits or testimony at the hearing. (FA 4; EF 191.) Attorney Gordon and the Executive Director submitted written closing arguments. (PF 133-171.) On May 10, 2022, the Presiding Officer issued a Recommended Decision. (Amend. A. 10-14; FA 4; PF 177-81.) Attorney Gordon and the Executive Director each submitted responses to the Recommended Decision. (PF 182-88.) The Presiding Officer declined to amend his Recommended Decision after receiving those responses. (PF 189.)

On September 28, 2022, a quorum of the Commission considered the Recommended Decision in a public meeting. (FA 15-45.)<sup>5</sup> Prior to the meeting they were provided with the Recommended Decision, all procedural filings, a link to the video recording of the evidentiary hearing, and the unredacted exhibits. (PF 193.) The Commission voted to accept the Recommended Decision with two modifications, each related to the sufficiency of Attorney Gordon's explanations to Executive Director Andrus's investigatory questions. (Amend. A. 15-17; FA 1-2 and 43-44.) On October 11, 2022, the Commission

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<sup>5</sup> Commissioner David Soucy did not believe that he had adequate time to review the record and abstained from the deliberations and vote. (FA 1, 16.)

issued its Order Adopting the Presiding Officer's Recommended Decision. (Amend. A. 15-17; FA 1.)

C. Rule 80C Appeal

On October 17, 2022, pursuant to M.R. Civ. P. 80C, Attorney Gordon filed a petition for review of the Commission's decision in Superior Court. (Amend. A 18-19.) Attorney Gordon's petition stated, "The grounds for this appeal involve a legal and factual challenge to the MCILS authority to suspend Mr. Gordon from the MCILS rosters." (*Id.*)

On March 1, 2023, Attorney Gordon, through counsel, filed a seven-page brief in support of his petition for review. (Amend. A. 1; Gordon Super. Ct. Br. (Mar. 1, 2023).) In that brief, Attorney Gordon made no legal arguments and cited no legal authority justifying his claim for relief. (*Id.*) Attorney Gordon recited his version of the facts, without citation to the record, and stated, in conclusory fashion: "The Interim Director's conclusion that Attorney Gordon's responses were not adequate was subjective and is not conclusive of whether Attorney Gordon 'complied' with the investigation." (*Id.* at 1-7.)

On March 29, 2023, the Commission filed its Rule 80C brief and pointed out that "Attorney Gordon fails to articulate any issue on appeal." (Amend. A. 1; Comm'n Br. in Super. Ct. (Mar. 29, 2023) at 9.) Attorney Gordon failed to file a reply brief. At oral argument before the Superior Court, Attorney Gordon,

through counsel, made several arguments that were not raised in his Rule 80C brief. (Amend. A. 7, fn. 3.)

On September 18, 2023, the Superior Court (*Lipez, J.*) issued a Decision and Order that affirmed the Commission's decision to suspend Attorney Gordon from the indigent defense roster. (Amend. A. 3.) The Superior Court determined that Attorney Gordon failed to identify a legal ground justifying his claim for relief from the Commission's Order and construed the appeal as a challenge to the Commission's factual findings that Attorney Gordon did not comply with Director Andrus's investigation. (Amend. A. 7.) According to the court, Attorney Gordon had waived various arguments made at oral argument, including that the Commission's decision was based on "unlawful procedure," because Attorney Gordon failed to develop them in his Rule 80C brief. (Amend. A. 7, fn. 3.) Ultimately, the Superior Court held that "competent evidence in the record supports the Commission's finding that Attorney Gordon failed to comply with the MCILS investigation." (Amend. A. 9.) On October 10, 2023, Attorney Gordon filed a notice of appeal. (Amend. A. 2.)



## **STATEMENT OF ISSUES**

- I. Whether Attorney Gordon failed to preserve any of the legal arguments that he asserts on appeal.
- II. Whether Attorney Gordon failed to meet his burden to demonstrate that there is no competent evidence in the record to support the Commission's finding that Attorney Gordon failed to comply with a Commission investigation.
- III. Whether Attorney Gordon failed to prove that the Commission abused its discretion when it affirmed the Executive Director's decision to suspend Attorney Gordon from Commission rosters.
- IV. Whether Attorney Gordon failed to establish that the Commission committed procedural errors.
- V. Whether Attorney Gordon failed to demonstrate that the Executive Director or the Commission was biased.

## **SUMMARY OF ARGUMENT**

Attorney Gordon did not present any legal issues to the Superior Court during its Rule 80C intermediate appellate review of the Commission's Order. Thus, he has not preserved any legal issues for this Court's appellate review. Should this Court nonetheless reach the merits of any of Attorney Gordon's arguments on appeal, it should uphold the Commission's Order.

First, substantial, competent evidence in the record supports the Commission's finding that Attorney Gordon violated a Commission rule by failing to comply with a Commission investigation. Attorney Gordon admitted that he had responsive documents but failed to provide them to the

Commission — even in a redacted form. Attorney Gordon also failed to provide appropriate releases so that the Commission could pursue obtaining any documents not in his possession.

Second, Attorney Gordon failed to prove that the Commission abused its discretion when it affirmed the Executive Director's decision to suspend Attorney Gordon. The Commission's rules allow for the suspension of an attorney who fails to comply with a Commission investigation. The Commission's decision to adopt the Presiding Officer's Recommended Decision, with modifications, and affirm Attorney Gordon's suspension from Commission rosters was well within its discretion and did not exceed the bounds of reasonable choices available to it.

Third, Attorney Gordon failed to demonstrate that the Commission committed any procedural errors. The Commission employed the requisite process and adequately considered all the viewpoints that it was required to consider.

Finally, Attorney Gordon did not prove that the Commission was biased. There is no evidence in the record that the Commission harbored any animus towards Attorney Gordon or treated him differently than any other attorney under investigation.

## ARGUMENT

### I. **Attorney Gordon failed to preserve any legal argument before this Court.**

Persons who appeal to this Court from a Superior Court decision reviewing an agency decision pursuant to the Maine Administrative Procedures Act, 5 M.R.S. §§ 11001-11008 (2023), and M.R. Civ. P. 80C waive any legal issues that they have not first raised in Superior Court. *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, n.2 (Me. 1986); *see also Sherwood v. Town of Kennebunkport*, 589 A.2d 453, n.1 (Me. 1991) (legal challenge to a municipal decision was not properly before the Court because it was not raised before the Superior Court); *Valente v. City of Westbrook*, 543 A.2d 1373, 1375 (Me. 1988) (concluding that one of plaintiff's arguments was not properly before the Court because it was not raised before the Superior Court).

Attorney Gordon did not raise any legal arguments before the Superior Court. (Amend. A. 7.)<sup>6</sup> Attorney Gordon's only contention was that the Executive Director's "conclusion that Attorney Gordon's responses were not adequate was subjective and is not conclusive." (Gordon Super. Ct. Br. (Mar. 1, 2023) at 7.) His Rule 80C brief was a near carbon copy of the closing argument that he submitted to the Commission. (Compare PF 133-41 to Gordon Super.

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<sup>6</sup> The Superior Court appropriately held that Attorney Gordon had waived issues raised at oral argument but not developed in his Rule 80C brief. (Amend. A. 7, n. 3.)

Ct. Br.) Neither submission contained any citation to the record, caselaw, or legal argument. (*Id.*)

At best, Attorney Gordon's Rule 80C brief challenged how the Commission weighed the facts in evidence, not the sufficiency of the evidence supporting the Commission's findings. Even if this Court concludes that Attorney Gordon raised a sufficiency of the evidence argument in the Superior Court, the record demonstrates that no other issues have been preserved. (Amend. A. 7.)

**II. Attorney Gordon failed to meet his burden of proving that no competent evidence supports the Commission's finding that he failed to comply with the investigation.**

The party seeking to overturn an agency's decision bears the burden of proving that no competent evidence supports the decision. *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551. The Court "must affirm the findings of fact if they are supported by any competent evidence in the record, even if evidence contrary to the result reached by the agency exists." *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 26, 153 A.3d 768. "Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Osprey Family Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 9, 141 A.3d 1114. "The substantial evidence standard does not

involve any weighing of the merits of evidence.” *Friends of Lincoln Lakes v. Bd. of Env'tl. Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128 (internal citations omitted).

Without any citation to the record, Attorney Gordon contends: “The factual findings to support the MCILS decision to suspend Attorney Gordon are simply not supported by the record, and, in fact, are just the contrary.” (Blue Br. 13.) This contention is contrary to the record.

Substantial, competent evidence in the record supports the Commission’s determination that Attorney Gordon failed to comply with a Commission investigation in violation of 94-649 C.M.R. ch. 2, § 2(2). The record demonstrates that the Executive Director, as part of a Commission investigation, asked Attorney Gordon for copies of non-confidential case materials related to his representation of the Former Client. (EH 321.) The record shows that Attorney Gordon failed to provide *any* responsive documents to the Commission during the investigation. (EH 127.)

Attorney Gordon’s focus on the purported constraints imposed by the Maine Rules of Professional Conduct upon his ability to respond to the Executive Director’s records requests is misplaced. (Blue Br. 9.) The Executive Director amended his initial request to request only those documents that Attorney Gordon believed were not confidential. (EH 321.) Attorney Gordon, through counsel, indicated that he had responsive documents and that they

would be provided to the Commission, but he failed to provide any. (EH 127, 326-27, 337-38.)

Substantial, competent evidence in the record also demonstrates that the Executive Director, as part of a Commission investigation, asked Attorney Gordon to provide a complete list of the dates he met with his former client. (EH 293-94.) The record shows that Attorney Gordon did not provide a complete list of those dates. (EH 97-99, 174, 300-01, 326-27.)

The record further establishes that the Executive Director, as part of a Commission investigation, asked Attorney Gordon to provide a release so that he could speak to individuals who may have responsive documents about obtaining that information. (EH 321.) Attorney Gordon failed to provide any such releases. (EH 122, 124, 137.)

Attorney Gordon asks this Court to inappropriately reweigh the merits of the evidence in the record. *See Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128. Attorney Gordon's disappointment over how the Commission weighed the evidence before it does not equate to a lack of substantial evidence in the record or an arbitrary or capricious decision. *See Sager*, 2004 ME 40, ¶ 11, 854 A.2d 567.

**III. Attorney Gordon failed to demonstrate that the Commission exceeded the bounds of reasonable choices available to it.**

“When the Superior Court acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, [this Court] review[s] the administrative agency’s decision directly for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record.” *Richard v. Sec’y of State*, 2018 ME 122, ¶ 21, 192 A.3d 611 (quotation marks omitted).

Attorney Gordon incorrectly asks this Court to review the Superior Court decision and determine that “the Court abused its discretion in upholding the MCILS decision.” (Blue Br. 14.) This Court does not review the Superior Court’s decision. *See Richard*, 2018 ME 122, ¶ 21, 192 A.3d 611.

Moreover, Attorney Gordon did not show that the Commission abused its discretion when it affirmed the decision to suspend him from the roster until he complies with the Commission investigation. “If an agency’s decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision.” *Forest Ecology Network v. Land Use Regulation Comm’n*, 2012 ME 36, ¶ 28, 39 A.3d 74. “An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of reasonable choices available to it, considering the facts and circumstances of the particular

case and the governing law.” *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 16, 88 A.3d 154 (quotation marks omitted). “It is not sufficient to demonstrate that, on the facts of the case, the decisionmaker could have made choices more acceptable to the appellant or even to a reviewing court.” *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 854 A.2d 567.

Attorney Gordon does not contend that the Executive Director lacked the authority to suspend him from the roster for failure to comply with a Commission investigation. The Executive Director has that express authority. 94-649 C.M.R. ch. 2, §§ 2 & 6 (Amend. A. 20-22; EH 370-72, 372.) The Executive Director was authorized to remove indefinitely or suspend Attorney Gordon from the roster completely or from the roster for certain case types and court locations for any failure to comply with any other Commission rule. 94-649 C.M.R. ch. 2, § 6 (Amend. A. 22; EH 372.) The Executive Director’s decision to suspend Attorney Gordon from the roster completely was eminently reasonable in light of the Commission’s mandate to provide indigent legal services in a fiscally responsible manner and Attorney Gordon’s failure to provide responsive documents to the Commission during the investigation.

Attorney Gordon, therefore, must demonstrate that the Commission “exceeded the bounds of choices available to it” when it affirmed the Executive Director’s suspension decision. He cannot do so. Based on the record before it,



the Commission was authorized, after considering the Presiding Officer's Recommended Decision, to (1) adopt the Presiding Officer's recommended decision as delivered, (2) modify the Presiding Officer's recommended decision, (3) send the matter back to the Presiding Officer for the taking of further evidence or for additional consideration of issues as set forth by the Commission, or (4) reject the Presiding Officer's recommended decision in whole or in part and decide the appeal itself on the basis of the existing record. 94-649 C.M.R. ch. 201. (EH 379.) The Commission chose to modify the Presiding Officer's Recommended Decision. (Amend. A. 15-17; FA 1-2 and 43-44.)

#### **IV. The Commission followed proper procedures.**

An agency's decision may be modified or vacated if it was "not the product of the requisite process" and results in procedural unfairness. *Hopkins v. Dep't of Human Servs.*, 2002 ME 129, ¶ 12, 802 A.2d 999.

Without specifying the alleged procedural irregularities, Attorney Gordon contends there was "arbitrary, and unlawful, procedure," "no set procedure," "no objective standards," and "no procedure at all." (Blue Br. 12.) Contrary to these contentions, the record shows that the Commission employed the requisite process and adequately considered all of the viewpoints that it was required to consider.

Attorney Gordon conflates the Executive Director’s investigatory process with the administrative review and appeal process used to review the Executive Director’s decision. (Blue Br. 12.) The record shows that both processes were well-reasoned and sensible.<sup>7</sup>

A. The Commission Investigation Process was fair and reasonable.

Attorney Gordon appears to argue that the Executive Director’s determination that he failed to comply with a Commission investigation was arbitrary and that the Commission’s affirmance of the decision was an abuse of its discretion. (Blue Br. 12.) Despite Attorney Gordon’s protestations to the contrary, neither the investigatory requests made of Attorney Gordon nor the standard used to determine compliance were a “guessing game.” (Blue Br. 13.)

Black’s Law Dictionary defines “comply” as “to do what is required or requested” and “failure to comply” as “a person’s failure to obey a lawful command or order.” (*Comply and Failure to Comply*, Black’s Law Dictionary (11th ed. 2019).) The standard that the Executive Director used to determine compliance was straightforward — did Attorney Gordon do what was requested? The evidence in the record demonstrates that he did not.

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<sup>7</sup> Attorney Gordon has not — and cannot — point to any legal authority that requires the Commission to establish a specific procedure for conducting its internal investigations. It would not be feasible for the Legislature or the Commission to supply precise procedures for an investigation as each Commission investigation is necessarily unique and tailored to the specific factual issues.

The Executive Director requested copies of documents and narrative explanations from Attorney Gordon. (EH 293-94.) The Executive Director then clarified his requests. (EH 304-06.) He then narrowed his request, informing Attorney Gordon that he could provide redacted documents. (EH 321.) The Executive Director additionally asked Attorney Gordon to provide a release to allow him to speak with any person that Attorney Gordon determined may hold responsive information so that Executive Director Andrus could speak to them about obtaining that information. (*Id.*)

Attorney Gordon acknowledged that he had access to responsive documents and indicated through counsel that he would provide what he believed to be non-privileged documents. (EH 326-27, 338.) Attorney Gordon did not provide the Commission with any documents or releases during the investigation. (EH 122, 124, 127, 137).

The Executive Director's decision to suspend Attorney Gordon's eligibility to accept cases to represent indigent people until he complied with the Commission investigation was the reasonable and foreseeable result of Attorney Gordon's failure to produce a single document or release during the investigation.

B. Attorney Gordon was afforded ample process through the Commission's Administrative Review and Appeal Process.

The Commission has an administrative review and appeal process for attorneys who are aggrieved when the Executive Director determines in the first instance that "an attorney previously found eligible is no longer eligible to receive assignments or to receive assignments in specialized case types pursuant to any commission rule setting for the eligibility requirements." 4 M.R.S. § 1804(3)(J). Chapter 201 specifies the procedure that the Commission follows when an attorney appeals a decision of the Executive Director. (EH 373-79.) The Commission afforded Attorney Gordon all the process outlined in Chapter 201. (PF 1-194; EH 1-411; FA 1-45.)

The Commission's Order adopting the Presiding Officer's Recommended Decision, which affirmed the Executive Director's decision, was issued after a full adjudicatory hearing in which Attorney Gordon was represented by counsel and was given the opportunity to present witnesses, evidence, and written closing arguments. (EH 1-411.) Attorney Gordon chose to present no witnesses and submit no evidence. He submitted written comments to the Recommended Decision and presented oral argument to the Commissioners prior to their consideration of the Recommended Decision. (PF 182-84; FA 16-27.) The Commissioners carefully considered the administrative record, accurately

recited the options available to them under their rules, and voted to adopt the Recommended Decision, subject to two modifications. (FA 1-45.) The Commission modified the Recommended Decision to acknowledge Attorney Gordon's efforts to comply with certain requests. (FA 1-2.)

The Commission's Order adopting the Recommended Decision affirming the Executive Director's decision was well within the bounds of reasonable choices available to the Commission. That the Commission could have made choices more acceptable to Attorney Gordon is not sufficient to demonstrate that the Commission abused its discretion. *See Sager*, 2004 ME 40, ¶ 11, 854 A.2d 567.

**V. Attorney Gordon failed to demonstrate that either the Executive Director or the Commission was biased.**

Although he failed to present this argument to the Superior Court, Attorney Gordon now argues that “[t]he Interim Executive Director and MCILS already had a bias against Attorney Gordon for his association with Fairfield [& Associates], which caused them to treat him differently in the investigation.” (Blue Br. 13.) The party raising a claim of bias must “offer proof to demonstrate an *actual risk* of bias or prejudice or some other form of partiality.” *N. Atl. Sec., LLC v. Office of Sec.*, 2014 ME 67, ¶ 44, 92 A.3d 335 (emphasis added). Decisionmakers “enjoy[ ] a presumption of honesty and integrity, which is only

rebutted by a showing of some substantial countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being adjudicated.” *Beal*, 2017 ME 6, ¶ 19, 153 A.3d 768 (citing *Mr. & Mrs. V. v. York Sch. Dist.*, 434 F. Supp. 2d 5, 12–13 (D. Me. 2006)). Attorney Gordon offered no such proof and failed to meet his burden of showing bias.

Attorney Gordon argues that the Commission was biased against him because it is engaged in litigation against his employer. (Blue Br. 13.) On the contrary, there is no evidence in the record that the Commission harbored any animus towards Attorney Gordon or his employer.<sup>8</sup> There is likewise no evidence in the record that the Commission treated Attorney Gordon any differently from any other attorney that the Commission has investigated.

The record shows that the Commission did not solicit information to investigate Attorney Gordon. (EH 66-68.) Rather, Commission staff was made aware of information that reasonably raised questions about Attorney Gordon’s billing practices and they complied with their obligation to manage the statewide system of indigent defense in a fiscally responsible manner. (EH 50-

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<sup>8</sup> This Court issued a memorandum of decision affirming an order of the Superior Court (Kennebec County, *Stokes, J.*) denying a special motion to dismiss the Commission’s complaint against his employer. *State of Maine v. Amy L. Fairfield*, Mem 23-7 (Jan. 5, 2023) (noting defendants did not meet their burden of showing that the claims brought against them were based solely on petitioning activity). The Commission’s complaint in that case asserts claims for conversion, unjust enrichment, and negligent misrepresentation. *See id.*

51, 65-66.) The record demonstrates that the Executive Director went out of his way to work with Attorney Gordon by clarifying and narrowing his requests, offering alternative methods of compliance, and extending deadlines. (EH 14, 96, 105, 110-12, 339.)

The Commission provided Attorney Gordon with every procedural protection required by its rules, and more, allowing oral argument prior to the Commission's discussion of the Recommended Decision. (FA 15-45.) Attorney Gordon has not and cannot rebut the presumption that Executive Director Andrus and the Commission acted with honesty and integrity.

### **CONCLUSION**

For the reasons stated above, the Commission respectfully requests that this Court affirm the Commission's Order.

Respectfully submitted,

DATED: February 28, 2024

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/s/ Megan M. Hudson-MacRae

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## CERTIFICATE OF SERVICE

I, Megan M. Hudson-MacRae, Attorney for the Maine Commission on Indigent Legal Services hereby certify that I have this 28th day of February 2024, caused two copies of the foregoing brief of Respondent/Appellee to be served upon Verne E. Paradie, Jr., Esq., Attorney for Petitioner/Appellant, Patrick Gordon, Esq., by first class mail at the following address:

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DATED: February 28, 2024

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