

Item 9 - Stipulation and Exhibit Summary

1 Kellie F. Johnson
2 Enforcement Chief
3 CITY OF OAKLAND PUBLIC ETHICS COMMISSION
4 1 Frank Ogawa Plaza, Rm. 104
5 Oakland, CA 94612
6 Telephone: (510) 238-4976

7
8 Petitioner

9
10 BEFORE THE CITY OF OAKLAND
11 PUBLIC ETHICS COMMISSION

12 IN THE MATTER OF) Case No.: 18-45
13)
14) **STIPULATION AND EXHIBIT**
15 JUSTIN BERTON,)
16) **Date:** 02/23/2022
17)
18 Respondent.) **Place:** 1 Ogawa Plaza, Hearing Rm. 1 Oakland, CA
19) 94612
20)

21 STIPULATION

22 Petitioner, the Enforcement Unit of the City of Oakland Public Ethics Commission, and Respondent
23 Justin Berton, agree as follows:

- 24 1. This Stipulation will be submitted for consideration by the City of Oakland Public Ethics
25 Commission (Commission) at its next regularly scheduled meeting;
- 26 2. This Stipulation resolves all factual and legal issues raised in this matter and represents the
27 final resolution to this matter without the necessity of holding an administrative hearing to
28 determine the liability of the Respondent;
3. Respondent knowingly and voluntarily waives all procedural rights under the Oakland City
Charter, Oakland Municipal Code, and Public Ethics Commission Complaint Procedures,
including, but not limited to, the right to personally appear at an administrative hearing held
in this matter, to be represented by an attorney at his own expense, to confront all witnesses
testifying at the hearing, to subpoena witnesses to testify at the hearing, and to have the
matter judicially reviewed;


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- 1 4. This Stipulation is not binding on any other law enforcement agency, and does not preclude
2 the Commission or its staff from referring the matter to, cooperating with, or assisting any
3 other government agency with regard to this matter, or any other matter related to it;
- 4 5. In 2018, Respondent Justin Berton, the Communications Director for the Oakland City Mayor,
5 violated the Government Ethics Act, Misuse of City Resources OMC 2.25.060 (a)(1), when he
6 posted four links to newspaper editorials that endorsed the mayor in 2018, to the mayor's
7 official Nextdoor public agencies/elected officials account, (Count 1).
- 8 6. The attached exhibit (Exhibit) is a true and accurate summary of the facts in this matter and
9 is incorporated by reference into this Stipulation;
- 10 7. The Commission will impose upon Respondent a total administrative penalty in the amount
11 of \$1,000 on Count 1.;
- 12 8. A cashier's check from Respondent, in said amount, made payable to the "City of Oakland,"
13 is submitted with this Stipulation as full payment of the administrative penalty, to be held by
14 the Commission until the Commission issues its decision and order regarding this matter;
- 15 9. In the event the Commission refuses to accept this Stipulation, it shall become null and void,
16 and within fifteen business days after the Commission meeting at which the Stipulation is
17 rejected, all payments tendered by Respondent in connection with this Stipulation will be
18 returned to them; and
- 19 10. In the event the Commission rejects the Stipulation and a full evidentiary hearing before the
20 Commission becomes necessary, neither any member of the Commission, nor the Executive
21 Director, shall be disqualified because of prior consideration of this Stipulation.

21 Dated: _____

Kellie F. Johnson, Enforcement Chief
City of Oakland Public Ethics Commission, Petitioner

23 Dated: _____


[Justin Berton \(May 23, 2022 10:51 PDT\)](#)

Justin Berton, Respondent

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DECISION AND ORDER

The foregoing Stipulation of the parties to “In the Matter of Justin Berton PEC Case No. 18-14, including all attached exhibits, is hereby accepted as the final Decision and Order of the City of Oakland Public Ethics Commission, effective upon execution below by the Chair.

Dated: _____

Arvon Perteet, Chair
City of Oakland Public Ethics Commission

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INTRODUCTION

1 On November 5, 2018, the City of Oakland Public Ethics Commission received a formal complaint that
2 alleged the Respondent, Justin Berton, the Director of Communications for Oakland Mayor Libby
3 Schaaf, violated a provision of the Government Ethics Act (GEA), Misuse of City Resources OMC
4 2.25.060 (a)(1), when he posted four links to newspaper editorials that endorsed the mayor in
5 2018 to the mayor’s official Nextdoor public agencies/elected officials account.

6 Pursuant to the allegations in the complaint and enforcement procedures, staff opened an
7 investigation to determine whether the Respondent violated GEA. After close consideration of all of
8 the facts and the law, and the reasons explained in this Exhibit, Staff recommends that the
9 Commission approve a stipulation that Justin Berton violated the Government Ethics Act for a
10 penalty of \$1000.

SUMMARY OF LAW:

11 All statutory references and discussions of law pertain to the referenced statutes and laws as they
12 existed at the time of the violations.

13 **O.M.C. 2.25.060** of the Government Ethics Act prohibits a public servant from using or permitting
14 others to use public resources for a campaign activity or for personal or non-City purposes not
15 authorized by law.¹

FACTUAL SUMMARY AND ANALYSIS:

16 In 2018, Respondent was the mayor’s Director of Communications. He had the authority to make
17 posts on various public and social media accounts of the Mayor, including drafting and sending out
18 public-facing communications. The Respondent was not required to seek prior approval from the
19 mayor or her chief of staff to make posts or send emails. He also supervised other staff members
20 who perform the same duties and was the mayor’s media liaison.

21 Prior to 2018, Mayor Schaaf’s public and political communications were generally delivered by email
22 newsletter, Facebook, Instagram and her Twitter accounts. She also had a previous Nextdoor
23 account that fell out of use by 2018. In August 2018, a representative from Nextdoor contacted the
24 mayor’s office to follow-up with the mayor on reviving her Public Agencies/Elected Officials account.
25 Later that month, the representative helped the mayor and her staff re-activate the public agencies
26 account and provided training on how to use the public agency platform, including tips, guidance,
27 demonstrative posts on how the account should be used, and a review of the Nextdoor public
28 agency/elected official policy. The Respondent attended that training along with the mayor’s chief of
staff, Shereda Nosakhare.

¹ As prohibited by California Government Code § 8314.

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1 Generally, Nextdoor is akin to an online messaging service where subscribers can communicate by
2 posts and emails to members of certain communities or geographical areas. Nextdoor provides a
3 general public platform for anyone who has access to the internet and meets the basic qualifications
4 to register as a member. Once established as a member, the average Nextdoor user can only access
5 or make posts within a limited geographical area or neighborhood.

6 Nextdoor also operates a separate public agency/elected official platform designated only for public
7 agencies or elected officials to primarily share or discuss policy or program matters with
8 constituents/subscribers of Nextdoor. Unlike the geographical restrictions imposed on the general
9 Nextdoor platform, the public agencies/elected officials account allowed a public official and his or
10 her designated staff to make posts that could be viewed and accessed by any Nextdoor subscriber in
11 a particular jurisdiction, thus reaching a larger audience.

12 According to the Nextdoor policy for public agencies/elected officials all public agencies/elected
13 officials were requested to use their “real name” first and last, title including the department name
14 from the public agency or office of the elected official. Public agencies and elected officials are
15 instructed to upload a profile picture or a picture of the department’s logo, badge or patch.²
16 Pursuant to Nextdoor terms of service and policy, public officials or anyone utilizing the platform on
17 their behalf, are prohibited from using the platform for political/campaign purposes.³

18 In August 2018, the mayor revived her public agencies and elected officials Nextdoor account, and
19 the Respondent along with select members of the mayor’s staff began using the Nextdoor account
20 on a regular basis to make posts concerning matters such as homelessness and bulk waste pickups.
21 The Respondent wrote most of the posts. Berton notified the mayoral staffers in September of 2018,
22 that the mayor’s posts were getting a lot of views, according to numbers compiled by Nextdoor.

23 On Sunday, November 4, 2018, two days before Mayor Schaaf’s re-election on November 6, 2018,
24 Berton posted the following to Nextdoor:

25 (1) Posted at 7:10AM:

26 **Subject: East Bay Express Endorses Libby Schaaf**

27 Honored to earn the sole endorsement of Oakland's alt-weekly. "The city is in better
28 financial health than when she took office and has operated more efficiently and
competently under City Administrator Sabrina Landreth; violent crime has continued

² Nextdoor Account Registration, “How to create and customize your agency profile.”

³ “Elected officials and staff are not permitted to use Nextdoor for Public Agencies for campaigning, campaign fundraising, announcing campaign events, position statements or any business other than official City or County business.” See, Nextdoor for Public Agencies Elected Officials Policy.

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1 to trend downward; police shootings and use of force cases have declined; and the
2 city is finally starting to build much-needed housing.
3 [https://www.eastbayexpress.com/oakland/our-november-2018-endorsement-
4 guide/Content?oid=21443046](https://www.eastbayexpress.com/oakland/our-november-2018-endorsement-guide/Content?oid=21443046)

5 (2) Posted at 7:18AM:

6 **Subject: San Francisco Chronicle Endorses Libby Schaaf**

7 Honored and humbled to receive the sole endorsement of the San Francisco
8 Chronicle. "Schaaf has approached each issue with a blend of tough-mindedness,
9 humanity and perspective. As she put it, her job is to 'not just solve the crisis of the
10 moment' but to pursue long-term solutions. She also has become Oakland's most
11 assertive ambassador and salesperson since her former mayoral boss, Jerry Brown,
12 held the office. [https://www.sfchronicle.com/opinion/editorials/article/Editorial-Re-
13 elect-Oakland-Mayor-Libby-Schaaf-13301310.php](https://www.sfchronicle.com/opinion/editorials/article/Editorial-Re-elect-Oakland-Mayor-Libby-Schaaf-13301310.php)

14 (3) Posted at 7:20AM:

15 **Subject: East Bay Times Endorses Libby Schaaf**

16 Honored + humbled to receive the sole endorsement of our East Bay Times. "Schaaf
17 clearly understands the scale and complexity of the problem - something none of her
18 opponents do." [https://www.mercurynews.com/2018/10/02/editorial-heres-why-to-re-
19 elect-oakland-mayor-libby-schaaf/](https://www.mercurynews.com/2018/10/02/editorial-heres-why-to-re-elect-oakland-mayor-libby-schaaf/)

20 (4) Posted at 7:26AM:

21 **Subject: The Bay Area Reporter Endorses Libby Schaaf**

22 Proud to earn the sole endorsement of The Bay Area Reporter. "Oakland Mayor
23 Libby Schaaf made a courageous decision earlier this year that her nine challengers
24 can't touch: in late February, she tweeted that 'credible sources' told her that an
25 immigration sweep by federal authorities was imminent and said it was her 'duty and
26 moral obligation' to warn families ... President Donald Trump and Attorney General
27 Jeff Sessions called her out, and Sessions said back in March that the Justice
28 Department was looking into obstruction of justice prosecution against her. Schaaf

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1 has stood her ground and told us during a recent editorial board meeting that she
2 would do it again. That took a lot of guts in the age of Trump....”

3 Two days before the City of Oakland November 2018, elections the Respondent wrote and uploaded
4 the posts above from his home, using his own laptop. During the investigation, the Respondent was
5 asked whether he knew his posts were campaign related at the time he made the posts, he admitted
6 that he knew the posts were campaign related rather than policy related, and that the purpose of
7 the posts was to encourage people to vote for Mayor Schaaf in the upcoming election. The
8 Respondent had made four similar posts on Twitter and Facebook that same day and had not
9 distinguished the fact that the Nextdoor account was an agency account whose terms of use were
10 limited to non-political or campaign related posts. The Respondent also reported that the mayor did
11 not ask him to make the posts, he did not coordinate the posts with the mayor’s campaign, nor did
12 he discuss them with the mayor or her chief of staff prior to making the posts.

11 After making the posts to Nextdoor, the Respondent said that he went to watch his child play
12 soccer. About three hours after uploading the posts, at or around 10:00 AM, the respondent received
13 notices on his cellular phone that detailed complaints from subscribers of the Nextdoor community
14 that alleged his campaign endorsement posts were a misuse of the public agency/elected official
15 account and violated policy rules. In response to the complaints, the Respondent decided on his own
16 to delete the posts. The posts were deleted shortly after 10:00 AM. On the same day, at 10:14 AM,
17 the Respondent sent a text to Mayor Schaff and stated the following:

16 Text Message
Sun, Nov 4, 10:14 AM

17 Justin Berton

18 FYI, I posted links to
19 endorsements from Chron
20 etc onto Nextdoor this am.
21 We got some complaints
22 ND Forum isn't intended for
23 that use so I deleted them
24 ASAP.

23 The PEC investigator made a request for and obtained email communications from both the City of
24 Oakland’s IT department and the mayor’s office. The email request solicited communications that
25 occurred around November 4, 2018, between the Respondent, and the mayor or her staff. The emails
26 obtained revealed that on November 4, 2018 at 5:09 PM, the Respondent was contacted by a
27 representative of Nextdoor, Alexa Kopelman about the campaign activity posts complaints. Ms.

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1 Kopelman sent a reminder of the public agency policy and arranged to speak with the Respondent or
2 a member of his staff the next day.

3 Following this incident, for an unspecified period, Nextdoor restricted the mayor's account from
4 posting to the public agencies' platform. The mayor also relieved the Respondent from use of the
5 mayor's public agency Nextdoor account and assigned the duty to a different staffer.

6 ANALYSIS:

7 Misuse of City Resources provides that a public servant is prohibited from using or permitting others
8 to use public resources for a campaign activity or for personal or non-City purposes not authorized
9 by law. The Government Ethics Act also provides a public servant includes any elected or appointed
10 office holder of the City of Oakland including any full-time or part-time employee of the City.⁴

11 **Public Servant**

12 The first element to establish a violation of the Misuse of Resources ordinance is whether the
13 Respondent is a public servant within the definition of the City municipal code. Here, the mayor is a
14 public servant because she is an elected City office holder and the Respondent is also a public
15 servant because he is a full-time salaried employee of the City.

16 **Use of City Resource of Value**

17 Secondly, to establish that a violation of the Misuse of City Resources ordinance occurred, there
18 must be sufficient facts to show that the public servant "used" City resources and that the value of
19 the resource was "substantial enough to result in a gain or advantage to the user or a loss to the City
20 for which a monetary value may be estimated."

21 Nextdoor's public agency platform is a City resource because it is a platform of value offered only to
22 a public agency or the elected official. The Nextdoor public agency platform is an asset of value for
23 the City because it provides a social media forum that can reach a large population of Oakland voters
24 and consumers, provide an avenue for rapid response and the sharing of information. Nextdoor also
25 provides a resource for elected officials to communicate directly with potential voters. According to
26 Nextdoor, members/subscribers to its platform are residents of the jurisdiction of an agency account
27 and are automatically subscribed to updates from that agency. Here, Nextdoor estimates that at
28 least 20% of Oakland's households are members/subscribers of the site/platform, which means about
80,000 people are automatically subscribed to receive updates from elected officials in Oakland,
including the mayor.

⁴ O.M.C. 2.25.030 (D) (1) and (2).

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1 According to WebFX, email marketing for the average campaign can cost between \$300 to \$1,200 a
2 month. TopDraw, Inc. an online advertising/marketing company, estimates that the average cost per
3 thousand impressions of \$3-\$10 and an average cost per click of \$1-\$3.

4 There is also a cost associated with procuring email marketing lists. According to
5 ActiveCampaign.com, an email marketing list can cost between \$100 and \$600 CPM (cost per
6 mille/the price for 1,000 email addresses.

7 Here, an estimate is obtainable of how much money the mayor's re-election campaign would have
8 had to spend on researching, drafting and sending blast emails or online advertisement, with the
9 mayor's endorsements, to approximately 80,000 people. The advertising cost would be in addition
10 to the cost associated with purchasing an email marketing list of about 80,000 people in Oakland.
11 Taken together, the cost of advertising (whether emails or online) and the costs of procuring an
12 email marketing list that would include 20% of Oaklanders, is substantial enough to result in a gain or
13 advantage to the mayor.

Campaign Activity/ Personal Purposes

14 Lastly, to establish a violation of the Misuse ordinance, the facts must also show that the City
15 resource was used either for a "campaign activity" or "personal purposes."

16 When interviewed by the PEC investigator, the Respondent asserted that he was not thinking of the
17 public agency policy when he uploaded the campaign endorsements for the mayor to her Nextdoor
18 account. He reports that he was at home that Sunday and thought to himself, "I'm going to share
19 these endorsements to her social media." He did not distinguish the Nextdoor account from her
20 other social media accounts, so he posted the endorsements to Nextdoor, just as he had posted the
21 links to the endorsements to her personal Twitter, Facebook and Instagram pages.

22 The Respondent has acknowledged that the posts he made on the Mayor's Nextdoor Public Agency
23 account were campaign related, and thus that he was not supposed to make those posts on that
24 account. He stated that the purpose of the posts was to encourage people to vote for the mayor.
25 The Respondent told the investigator that he had always understood that the use of City resources
26 was "emphatically" not permitted "at all," and that the prohibition extended to the mayor's official
27 government agency social media accounts. He also told the investigator that he understood at the
28 time he shared the endorsements that he was sharing an editorial endorsing the mayor and that it
would be an act of campaigning. Thus, the Respondent acted with knowledge of the rules, although
he maintains that the posting of campaign-related links was a mistake that he made as he hurried to
get his children to their soccer game on a Sunday morning.

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1 In addition to the Respondent's admissions, the following facts indicate that he had been aware that
2 posting editorials of endorsements for the mayor was campaign material that should not have been
3 posted on the Nextdoor public agency account. In August of 2018, three months before he uploaded
4 the campaign posts, the Respondent was trained on the use of Nextdoor and informed of the public
5 agencies/elected officials' policy that prohibited the use of the platform for campaigning.

6 It can also be inferred that the Respondent knew that the posts were campaign-related because the
7 endorsements for the mayor were obvious and easily identifiable as campaign material. The posts
8 were so readily identifiable as prohibited campaign material that later in the day on November 4,
9 2018, a Nextdoor representative contacted the Respondent and the mayor's staff and informed
10 them that the posts the Respondent made violated the public agency policy and was considered
11 campaign activity. The posts were so easy to identify as prohibited campaign-related material that
12 multiple Oakland Subscribers of Nextdoor, within a few hours of the Respondent posting the
13 endorsements, complained.

14 Alternatively, even if the use of the City resource was not for a "campaign activity," arguably, the
15 Nextdoor account was used for the mayor's or the Respondent's "personal purposes." The Electoral
16 campaign of an elected official is not City related business. Thus, the Respondent's posts, designed
17 for the specific purpose to elicit votes for the mayor, were activities for private gain or advantage, or
18 an outside endeavor not related to City business.

VIOLATION(S):

19 Respondent, Justin Berton, violated the following Oakland Municipal Code(s):

Count 1: Misuse of City Resources

20 On or about November 4, 2018, Respondent, Justin Berton, the Director of Communications for the
21 Mayor of the City of Oakland, violated O.M.C. 2.25.060 of the Oakland Government Ethics Act when
22 he used a Nextdoor public agency/elected officials account (a City resource) reserved for City
23 Officials or designated elected officials to post campaign/political activity or non-City purpose not
24 authorized by law.

PENALTIES:

25 Oakland Government Ethics Act authorizes the Commission to impose maximum administrative
26 penalties of up to \$5,000, or three times the amount unlawfully used/gained (whichever is greater),
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1 per violation. The Base level penalty for this type of violation is \$2,000.⁵ Staff recommends that the
2 Commission impose a \$1,000 penalty.

3 The PEC will consider all relevant mitigating and aggravating circumstances surrounding a violation
4 when deciding on a penalty, including, but not limited to, the following factors:

- 5 1. The seriousness of the violation, including, but not limited to, the extent of the public impact
6 or harm;
- 7 2. The presence or absence of any intention to conceal, deceive, or mislead;
- 8 3. Whether the violation was deliberate, negligent, or inadvertent;
- 9 4. Whether the violation was isolated or part of a pattern;
- 10 5. Whether the respondent has a prior record of violations and/or demonstrated knowledge of
11 the rule or requirement at issue;
- 12 6. The extent to which the respondent voluntarily and quickly took the steps necessary to cure
13 the violation (either independently or after contact from the PEC);
- 14 7. The degree to which the respondent cooperated with the PEC's enforcement activity in a
15 timely manner;
- 16 8. The relative experience of the respondent.

17 The PEC has broad discretion in evaluating a violation and determining the appropriate penalty based
18 on the totality of circumstances. This list of factors to consider is not an exhaustive list, but rather a
19 sampling of factors that could be considered. There is no requirement or intention that each factor –
20 or any specific number of factors - be present in an enforcement action when determining a penalty.
21 As such, the ability or inability to prove or disprove any factor or group of factors shall in no way
22 restrict the PEC's power to bring an enforcement action or impose a penalty

Aggravating Factors

23 Here, the circumstances of the Respondent's conduct establish aggravating factors that should
24 increase the severity of the penalty:

- 25 1. The Respondent had demonstrated knowledge of both the City's Misuse of City Resources
26 and the Nextdoor prohibition against campaign-related posts.
- 27 2. The community was harmed by the Respondent's actions.
- 28 3. The Respondent's conduct was negligent.

⁵ Public Ethics Commission Enforcement Penalty Guidelines, Page 4.

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1 **Mitigating Factors**

- 2
- 3 1. Respondent does not have prior Public Ethics Commission violations.
 - 4 2. The Respondent cooperated with the Public Ethics Commission enforcement activity.
 - 5 3. The Respondent was disciplined by the mayor's office and relieved of Nextdoor posting duties.

6 The decision to make a recommendation of \$1,000 was informed by first evaluating the weight of the
7 mitigating factors such as the age of the case, the ability of the Respondent to pay a penalty, his
8 cooperation with the investigation and the discipline the mayor imposed by removing the
9 Respondent's access to Nextdoor. Based on the mitigating factors, a lesser penalty than the baseline
is fair.

10 On-the-other-hand, aggravating factors, including the fact that the Respondent is the
11 Communications Director for an elected official and should have known that he needed to exercise
12 care in posting political endorsements on behalf of the mayor. The facts also establish that
13 Respondent intended to post endorsements for the mayor on her social media sites, and the posts
14 were not made accidentally, even if he contends that their inclusion specifically on the Nextdoor
15 public agency account was. The Respondent's failure was that he did not exercise due diligence or
16 even take steps to confirm that he was posting to the correct account. Lastly, and most important
17 the posts caused significant harm to the Nextdoor subscriber community, resulting in multiple
complaints and subscriber concern. Each aggravating factor balanced against the mitigating factors
support the imposition of a financial penalty of \$1,000, and not a warning letter, diversion or a lesser
penalty amount.

18 **RECOMMENDATION:**

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20 Based on the analysis above, Staff recommends that the Commission approve a stipulated
21 agreement and impose a financial penalty in the amount of \$1,000.

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