

Applicant Number



In re Hastings

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In re Hastings

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FILE

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Belford & Swan S.C.
Attorneys at Law
6701 San Jacinto Avenue, Suite 290
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MEMORANDUM

To: Examinee
From: Emily Swan
Date: February 27, 2018
Re: Danielle Hastings inquiry

A friend of mine from college, Danielle Hastings, has asked me to look into a legal matter for her. Danielle currently serves on the board of directors for Municipal Utility District No. 12 (MUD 12). MUDs are local government entities, authorized by the Franklin constitution, that provide public water, sewer, drainage, and other services to suburban neighborhoods not served by a city.

Danielle has always been civic-minded, and she is very involved in her community. In addition to being a director for MUD 12, she volunteers at the local library and is a volleyball coach at the local YMCA. She is interested in getting involved in election and voting activities in her community. There are two election-related positions available in her voting precinct: county election judge and precinct chair.

Both positions sound interesting to Danielle. She is not sure which position she would want. Before making any decision, she needs our advice as to whether she is allowed to serve as a county election judge or precinct chair while at the same time remaining a MUD 12 director. I have attached several opinions by the Attorney General of Franklin, which discuss the applicable law.

Please draft a memorandum to me analyzing whether Danielle can apply for and hold the county election judge position or the precinct chair position while simultaneously serving as a member of the board of directors for MUD 12. Address the question for both the county election judge and precinct chair positions. Make sure to discuss all legal issues relating to each position. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts and legal authorities into your analysis.

Transcript of Client Interview with Danielle Hastings

February 26, 2018

Att’y Swan: Hi, Danielle, it’s great to see you. Gosh, it’s been a while!

Danielle Hastings: Yes, it has. I think the last time we ran into each other was a couple of years ago at our college class reunion.

Swan: How is everything going? I got your phone message indicating that you wanted my advice on a legal problem, but you didn’t say what the problem was.

Hastings: Well, as I think I mentioned at our class reunion, in addition to my day job as a graphic artist, I’m also a member of the board of directors for Municipal Utility District No. 12, which provides water, sewer, and drainage services to my neighborhood, Eagle Springs.

Swan: Yes, I remember your saying you were active on a MUD board in your community. How is that going?

Hastings: Everything is fine. And I love the work I do as a MUD director. But I’m always looking for opportunities to get involved in my community, and frankly, I have higher political ambitions. Recently, I heard about two open positions that sound really interesting and would further my political career.

Swan: Tell me more.

Hastings: Well, a friend of mine who’s active in local politics and highly involved in our political party mentioned that there is an open position for county election judge, which would involve supervising elections in my precinct. He also said that our political party is looking for precinct chairs to help reach out to voters and educate them about the candidates in our political party who are running for office.

Swan: What’s the process for becoming an election judge or precinct chair?

Hastings: The county election judge is an appointed position, but the precinct chair is an elected position within the political party, which means that I would have to run as a candidate for precinct chair and be elected to the position.

Swan: And both of these positions are for the voting precinct that you live in?

Hastings: Yes. My precinct includes Eagle Springs as well as a handful of adjacent neighborhoods.

Swan: What else do you know about the two positions?

Hastings: Well, I've printed out some information from the Marin County website that compares the two positions. [Printout from website attached.] It's my understanding that if I'm appointed as a county election judge, then I would be the chief election judge for my precinct since the governor is from my political party.

Swan: Do you have a preference between the two positions?

Hastings: No, both sound very interesting, and either position would provide an opportunity to get more involved in the election process, which is something that I've been wanting to do. If you tell me that I can hold either position while remaining on the MUD board, then I would have to decide which of the new positions to pursue. On the other hand, if you tell me that I can't hold either of the positions while simultaneously serving on the MUD board, then I won't need to choose because my decision will be made for me.

Swan: Tell me more about the MUD board. I think that it is important to understand what you do as a MUD director in order to evaluate whether you could hold the position of county election judge or precinct chair while simultaneously serving on the MUD board.

Hastings: As you know, MUDs provide public water, sewer, drainage, and other basic services to suburban residents who are not served by a city. MUD 12 provides these services to residents of Eagle Springs, about 1,500 homes in all. Basically, the MUD owns, operates, and maintains all the facilities necessary to supply water to Eagle Springs residents, collect and treat wastewater from their homes, and collect, store, and drain storm water from land within the MUD's boundaries. This includes a water plant, a wastewater treatment plant, and drainage ditches, all located within Eagle Springs. In addition, the MUD provides trash collection service for our residents, and we also own and operate two public parks within the Eagle Springs community.

Swan: MUDs are political subdivisions of the State of Franklin, right?

Hastings: Correct. MUDs operate independently of county government. I've heard them described as being one of the most fundamental forms of local government

because they provide municipal-level services, have elected officials who live in the MUD, and are authorized to charge fees to their residents, assess and collect taxes, and sell bonds in order to pay the costs of constructing and operating the facilities that provide services to their residents.

Swan: Can you tell me more about the MUD board of directors election process? Are your elections handled by Marin County?

Hastings: No. Under state law, MUDs conduct their own elections, which are held in May. MUDs also appoint their own election judges for the MUD elections. The partisan or political elections, like those for governor and state assembly, are held in November, and those are the ones the Marin County election judges oversee.

Swan: So if you were appointed as a county election judge for your precinct, you wouldn't be involved in overseeing any MUD elections?

Hastings: Right, MUD elections are totally separate. MUD boards really aren't all that political in the party sense—they're nonpartisan. Nobody runs for a MUD position as a "Democrat" or "Republican." They run for the MUD board because they live in the MUD, they care about the basic services that are being provided, and they want to be involved in their community and make a difference.

Swan: How long have you served on the MUD 12 board?

Hastings: This is my second four-year term on the board. Our last election was in May 2016, so I am midway through my current term. I want to remain on the MUD board for at least another term or two.

Swan: Okay, I think I have enough basic information to start looking into this issue. I should have answers for you within a week or two, which will give you plenty of time to weigh your options.

Hastings: Great. Thanks.

**Printout of
Marin County Board of Elections
Position Descriptions**

Source: www.marincountyfranklin.gov

COUNTY ELECTION JUDGE [Summary prepared based on state election law]

What is a county election judge?

County election judges conduct the city, county, state, and federal elections in a precinct during the year. Election judges are the head officials in charge of election-day activities.

What does an election judge do?

County election judges administer the election procedures set forth in the Franklin Election Code to help ensure that elections are secure, accurate, fair, and accessible to all voters. Responsibilities include handling and securing election equipment and ballots, locating and retaining election clerks to work at their polling location, organizing the setup of the election equipment and the operation of the election, handing out and collecting ballots, setting up and closing down the polling site, and certifying the polling site results.

Election judges also serve on a panel to resolve any voting-related challenges that may arise. Election judges are responsible for following the Franklin Election Code and conducting a fair election. Although each judge is nominated by his or her political party, no display of any party affiliation is allowed during the election.

How do you get to be an election judge?

Election judges are nominated by their respective parties and are appointed by the Marin County Board of Commissioners to two-year terms. If possible, election judges reside in the precinct.

What is a chief election judge?

Two judges, one from each major political party, are appointed for each precinct. The chief election judge is from the party that received more votes in the last governor's election. The second judge works closely with the chief election judge and is responsible for conducting the election in the chief judge's absence. Both judges are required to attend training.

Is election judge a paid position?

Election judges are volunteers. They are reimbursed for the cost of any training, supplies purchased, or other expenses incurred, but are otherwise not compensated.

PRECINCT CHAIR [Summary prepared based on party bylaws]

What is a precinct chair?

A precinct is the smallest political subdivision in Franklin. Franklin counties are divided into individual precincts, each consisting of a collection of adjacent neighborhoods. Precinct chairs are political positions created by their political parties and not by statute. They are the primary political agents for the Democratic and Republican parties in their precincts. They are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts. Precinct chairs also represent their home precincts on their party's Executive Committee (EC), which conducts the local business of that political party.

What does a precinct chair do?

In addition to serving on his or her party's EC, each precinct chair is the contact person for his or her respective political party in his or her precinct. Organizing and campaigning are important duties of a precinct chair. Precinct chairs are responsible for working with others to mobilize and organize voters and get them to the polls, bridging the gap between voters and elected officials, and promoting their party's candidates and events. This includes organizing phone banks to place telephone calls to voters, organizing block walks (going door-to-door) to distribute campaign materials, and encouraging neighbors to vote in upcoming primary and general elections.

What is the Executive Committee?

Marin County has two Executive Committees: a Democratic EC and a Republican EC. Each party's EC is the governing body of that political party in Marin County and conducts all official party business. Each party's EC usually meets three times a year, sometimes more in election years. Precinct chairs are voting members of their ECs.

How do you get to be a precinct chair?

Candidates for precinct chair are elected to serve two-year terms by voters in their precincts in the respective Democratic or Republican primary election every two years.

Is precinct chair a paid position?

Precinct chairs are volunteers and are not compensated for their service.

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STATE OF FRANKLIN CONSTITUTION

ARTICLE XII

§ 25. HOLDING MORE THAN ONE OFFICE; EXCEPTIONS

(a) No person shall hold or exercise, at the same time, more than one civil office of emolument, except for justices of the peace, county commissioners, and officers and enlisted men and women of the United States Armed Forces, the National Guard, and the Franklin State Guard, or unless otherwise specially provided herein.

(b) Exceptions: . . .

(4) a public schoolteacher or retired schoolteacher may receive compensation for serving as a member of a governing body of a municipal utility district (MUD).

Excerpts from the Franklin Election Code

§ 465. Appointment of Election Judges for Each Election Precinct. Election judges shall be appointed by each county for each election precinct in which an election is held.

* * *

§ 471. General Responsibility of County Election Judges.

(a) The chief judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.

(b) The chief judge for each election precinct shall appoint election clerks to assist the judge in the conduct of an election at the polling place served by the judge.

(c) The chief judge shall designate the working hours of and assign the duties to be performed by the election clerks serving under the judge.

...

(f) The chief judge shall preserve order and prevent breaches of the peace and violations of this code in the polling place and in the area within which electioneering and loitering are prohibited. In performing duties under this subsection, the chief judge may appoint one or more licensed persons to act as special peace officers for the polling place.

...

(h) An election judge may administer any oath required to be made at a polling place.

* * *

§ 480. Ineligibility of Candidate for Office. A person who is a candidate in an election for a contested public or party office is ineligible to serve, in an election to be held on the same day as that election, as an election judge or clerk in any precinct in which the office sought is to be voted on.

* * *

§ 492. Judges for Elections of Other Political Subdivisions. The governing body of a political subdivision other than a county shall appoint the election judges for elections ordered by the political subdivision.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2003-9
March 17, 2003

Re: Whether Franklin Constitution article XII, section 25 prohibits a constable from simultaneously serving as a commissioner of an emergency services district

The issue presented is whether article XII, section 25 of the Franklin Constitution prohibits a constable from serving as a commissioner of an emergency services district (ESD) in the same county. We must examine each of the offices at issue.

Article XII, section 25(a) provides that “[n]o person shall hold or exercise, at the same time, more than one civil office of emolument.” The constitutional dual-officeholding prohibition applies if both positions (1) qualify as “civil offices” and (2) are entitled to an “emolument.”

First, we have previously determined that a constable holds a civil office of emolument. Franklin Att’y Gen. Op. No. 1999-8 (1999); *see also* FRANKLIN LOCAL GOV’T CODE § 453 (defining a constable as a “peace officer” and mandating that constables be paid on a salary basis).

Next, we must examine whether the position of ESD commissioner is also a civil office of emolument subject to article XII, section 25. The determinative factor distinguishing an officer from an employee is “whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others.” *Morris Indep. Sch. Dist. v. Lehigh* (Franklin Supreme Ct. 1965).

ESDs independently exercise various governmental powers for the benefit of the public, including the power to appoint agents and employees, enter into contracts, purchase and sell property, borrow money, sue and be sued, impose and collect taxes, and perform other necessary acts relevant to providing emergency services. FRANKLIN LOCAL GOV’T CODE § 752. ESD commissioners serve as the ESD’s governing board. Based on the broad, independent authority granted to ESDs, we conclude that ESD commissioners meet the *Morris* test and are thus civil officers.

Next we determine whether an ESD commissioner holds an office of “emolument.” An emolument is “a pecuniary profit, gain or advantage.” *State v. Babcock* (Franklin Ct. App. 1998). If an officeholder is entitled to compensation, his or her office is an “office of emolument” even if the person refuses to accept any compensation. However, the term “emolument” does not include the legitimate reimbursement of expenses. While the reimbursement of actual expenses does not constitute an emolument, any amount received in excess of actual expenses is an emolument. *Id.* Likewise, an amount received as compensation for each meeting (e.g., a fixed per diem amount) is also an emolument. *Id.*

By statute, an ESD commissioner “is entitled to receive compensation of \$50 for each day the commissioner attends a commission meeting,” and additionally “may be reimbursed for reasonable and necessary expenses incurred in performing official duties.” FRANKLIN LOCAL GOV’T CODE § 775. The \$50 per diem compensation qualifies as an emolument.

Because an ESD commissioner receives compensation for his or her services and holds a civil office of emolument, he or she cannot hold another civil office of emolument—here, constable.

SUMMARY

Article XII, section 25 of the Franklin Constitution prohibits a person from simultaneously serving as a constable and an ESD commissioner. Because we conclude that article XII, section 25 prohibits dual service in this circumstance, we need not consider whether simultaneously holding the positions of constable and ESD commissioner would implicate the common law doctrine of incompatibility.

ATTORNEY GENERAL OF FRANKLIN

**Opinion No. 2008-12
February 6, 2008**

Re: Whether an individual may simultaneously serve as director of a municipal utility district and member of the city zoning commission

The issue presented is whether an individual who serves as a member of the board of directors for Montgomery County Municipal Utility District No. 6 (MUD 6) may also serve as a member of the Planning and Zoning Commission (PZC) for the City of Waterford. We conclude that one person is barred from holding both offices by the common law doctrine of incompatibility.

Civil office of emolument

Article XII, section 25(a) of the Franklin Constitution provides that “[n]o person shall hold or exercise, at the same time, more than one civil office of emolument,” subject to exceptions that are not relevant in this situation. MUD directors are entitled to receive compensation for serving on the MUD board—specifically, a \$150 per diem payment as compensation for attending MUD board meetings or engaging in other MUD-related activities. FR. WATER CODE § 46. In contrast, members of the PZC serve without compensation. Because PZC commissioners do not receive compensation, they are not civil officers of emolument. Therefore, article XII, section 25 of the Franklin Constitution does not bar a person from serving on the PZC and holding another office.

Common law doctrine of incompatibility

The common law doctrine of incompatibility may, however, prevent this dual service, whether or not a member of the PZC receives compensation for that position, because compensation is not relevant to determining whether offices are incompatible. The common law doctrine of incompatibility bars one person from holding two civil offices if the offices’ duties conflict. *Spencer v. Lafayette Indep. Sch. Dist.* (Franklin Ct. App. 1947). The doctrine has three aspects: self-appointment, self-employment, and conflicting loyalties. Self-appointment and

self-employment are only implicated if the responsibilities of one position include appointing or employing the second position. Here, the MUD does not appoint or employ members of the PZC and vice versa. Therefore, the only inquiry is whether the two positions involve conflicting loyalties.

The opinion in *Spencer* held that the offices of school trustee and city council member were incompatible because the boundaries of the school district's and city's jurisdictions overlapped, and the city council had authority over health, quarantine, sanitary, and fire prevention regulations applicable to school property. The court reasoned that if a person could be a school trustee and a member of the city council at the same time, school policies could be influenced or even controlled by the city council instead of the school trustees. *Id.*

As a threshold matter, in order for the conflicting-loyalties prong to apply, each position must constitute a "civil office." Therefore, we must first consider whether directors of MUDs and members of the PZC are civil officers. The Franklin Supreme Court has articulated the following test for determining whether an individual holds a civil office: "The determining factor which distinguishes a civil officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." *Morris Indep. Sch. Dist. v. Lehigh* (Franklin Supreme Ct. 1965).

Municipal utility districts provide water, sewer, drainage, and other services to suburban communities. They are local (as opposed to state or county) government entities authorized under the Franklin Constitution and are subject to the Franklin Water Code. They are governed by a board of directors, who are elected to four-year terms. FRANKLIN WATER CODE § 35. A MUD board is responsible for "the management of all the affairs of the district" (*id.* § 37) and may levy and collect a tax for operation and maintenance purposes, charge fees for provision of district services, issue bonds or other financial obligations to borrow money for its purposes, and exercise various other powers set out in the Franklin Water Code (*id.* § 39). A director of a MUD is a civil officer within the test stated by the Franklin Supreme Court in *Morris* based on the number of independent functions delegated to MUD boards under the Water Code, several of which are discussed above.

We next consider whether members of the Waterford PZC are civil officers. Cities such as Waterford have zoning authority and are authorized to appoint a zoning commission. If the

Waterford PZC exercises governmental powers delegated by the city council, its members will be civil officers.

The Waterford PZC consists of nine citizens of Waterford who are appointed by the city council for a term of two years. The Waterford PZC is responsible for final approval of plats for residential development in the City. In our opinion, members of the Waterford PZC exercise a sovereign function of the government “for the benefit of the general public largely independent of the control of others” within the *Morris* test and are therefore civil officers.

Our next consideration is whether members of the Waterford PZC have powers and duties that are incompatible with the powers and duties of a MUD director. During the plat approval process, the PZC requires submission of preliminary utility plans identifying the nature and location of water and sewer services such as water and sewer plants. A PZC member who is also a director of a MUD may have divided loyalties when the proposed development is located within the MUD on whose board the PZC member serves. In this situation, the PZC is able to control and impose its policies on the MUD by determining the manner and placement of the MUD’s facilities.

We conclude that the two civil offices are incompatible, and that a member of the PZC who also serves on a MUD would have divided loyalties in facing decisions that affected his or her MUD. We conclude that the common law doctrine of incompatibility prevents a member of the Waterford PZC from serving simultaneously as a director of a MUD with territory within the zoning authority boundaries of Waterford.

SUMMARY

A MUD director holds a civil office, as does a member of the PZC of the City of Waterford. Because the duties of those two offices are in conflict where the offices have overlapping jurisdictions, the common law doctrine of incompatibility bars one person from simultaneously holding both offices.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2010-7 September 5, 2010

Re: Whether a member of a school district board of trustees may simultaneously hold the office of county treasurer

The issue presented is whether a trustee of an independent school district may simultaneously hold the office of county treasurer. For the reasons explained below, we conclude that she may do so. In the situation presented, the individual was elected for a three-year term on the board of trustees of Winfield Independent School District. Subsequently, she was appointed by the Board of Commissioners of Winfield County to fill the balance of a four-year term as the Winfield County Treasurer.

Civil office of emolument

When we consider article XII, section 25 of the Franklin Constitution and our Opinion No. 2003-9, we conclude that an individual is not barred by article XII, section 25 from simultaneously holding the offices of school trustee and county treasurer. Section 384 of the Franklin Education Code requires that trustees of an independent school district “serve without compensation.” Because the office of school trustee is therefore not an “office of emolument,” it follows that an individual is not barred by article XII, section 25 from simultaneously holding the offices of school trustee and county treasurer.

That does not end our inquiry, however.

Common law doctrine of incompatibility

Common law incompatibility is independent of article XII, section 25. The three aspects of the doctrine are self-appointment, self-employment, and conflicting loyalties. Self-appointment and self-employment are not implicated here because the county treasurer neither appoints nor employs members of the school board of trustees. Nor does the school board of trustees appoint or employ the county treasurer.

The third aspect of common law incompatibility, conflicting loyalties, bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. If, for example, two governmental bodies are authorized to contract with each other, one person may not serve as a member of both.

Conflicting loyalties

Based on these principles, we must determine whether there are any duties ascribed to the office of county treasurer that would render its holding incompatible with that of school district trustee. The county treasurer is the chief custodian of county funds and is responsible for accounting for and managing all money belonging to the county, including depositing funds received by the county and disbursing county funds to pay county debts as required by law. FRANKLIN LOCAL GOV'T CODE § 411.

A number of statutes peripherally relate to the duties of the county treasurer with respect to school funds, but all of these appear to prescribe purely ministerial duties or duties that do not apply in this circumstance, such as collecting debts and maintaining the original financing records for schools in counties that do not have any independent school district. In this case, Winfield County has its own independent school district (i.e., Winfield Independent School District). The school district is a separate, distinct governmental entity with separate authority to acquire and hold real and personal property, sue and be sued, and maintain its own funds. FRANKLIN EDUC. CODE § 1251.

Conceivably, a county treasurer could initiate actions to recover funds owed to Winfield County by the Winfield Independent School District. However, the county treasurer's authority is not exclusive. The Board of Commissioners, as the executive head of the county, is vested with authority to determine when suits or other actions should be instituted to recover funds belonging to the county and can separately sue to collect debts owed to the county. If it were determined that funds were owed to Winfield County by the Winfield Independent School District, the Board of Commissioners would be the proper party to sue to recover those funds. Therefore, in our opinion, the county treasurer's non-exclusive authority to sue to recover funds

owed by the school district to the county does not rise to the level of incompatibility contemplated by the common law doctrine of incompatibility.

Because a county treasurer's authority to sue an independent school district is limited to the recovery of funds owed by the school district to the county, and because even that limited authority is not exclusive, we conclude that conflicting-loyalties incompatibility is not, as a matter of law, a bar to an individual's simultaneously holding the offices of county treasurer and trustee of an independent school district located within his or her county.

SUMMARY

A county treasurer is not, as a matter of law, barred either by article XII, section 25 of the Franklin Constitution or by the common law doctrine of incompatibility from simultaneously holding the office of trustee of an independent school district located within her county.

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MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.