

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

IN RE:

**LANCASTER COUNTY INVESTIGATING
GRAND JURY II, 2005**

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INVESTIGATION NO.

COMMONWEALTH'S AFFIDAVIT

I, Donald R. Totaro, District Attorney of Lancaster County, Pennsylvania, the affiant below,
having been duly deposed, represents as follows:

1. The original Notice of Submission regarding the resume and hiring of Gary Heinke was prepared and filed after the Lancaster County Board of Commissioners initially failed to comply with a request for production of documents through traditional investigative means. This request was made based upon specific allegations of criminal conduct by Mr. Heinke (Unsworn Falsification to Authorities), and questions as to whether any members of the Board of Commissioners assisted in the fabrication of Mr. Heinke's resume.
2. On November 7, 2005, at 8:14 a.m., this affiant emailed then-Lancaster County Director of Human Resources J. Thomas Myers as well as the entire Board of Commissioners requesting a copy of the Myers report, which explained the hiring process for Gary Heinke. Although the email was opened by all three county commissioners on November 7, 2005, not one commissioner responded to that email prior to filing of the Notice of Submission.
3. On November 9, 2005, the completed Myers report was presented to the Board of Commissioners. Despite the fact that the report had been completed and presented to the Commissioners, there was still no reply from Mr. Myers or any of the Commissioners to

this affiant's email of November 7, 2005 requesting a copy of the report. This office also did not receive a copy of that report.

4. Because November 11, 2005 was Veteran's Day, and county government would be closed for the holiday, a decision was made to prepare a Notice of Submission and present this matter to the Supervising Judge of the Lancaster County Investigating Grand Jury on November 10, 2005. This decision was made because of the total lack of response from the Board of Commissioners to a request from this office for a copy of the report, and because several sources expressed concern that information relevant to the investigation could be misplaced or destroyed over the long holiday weekend.
5. To eliminate the possibility that any evidence could disappear over the long weekend, the Notice of Submission would then allow this office to file at the same time a Motion to Prevent Destruction of Evidence During the Investigation by the County Investigating Grand Jury. Absent probable cause, the District Attorney's office could not obtain a search warrant to seize computers or other documents. However, by submitting this investigation to the Grand Jury, our office could preserve said evidence and then utilize subpoena powers to receive the necessary information.
6. During the afternoon hours of November 10, 2005, while the Notice of Submission and Motion to Prevent Destruction of Evidence were being prepared, a copy of the Myers report was finally served on the District Attorney's Office. Nevertheless, the failure of the commissioners to respond to this affiant's email of November 7, 2005, and the substantial delay in providing this office with the completed Myers report remained a concern regarding the extent to which the commissioners or Mr. Myers would voluntarily

cooperate with our investigation. Furthermore, the content of the report contained information indicating important emails were not archived, none of the commissioners recalled engaging in a 32 minute conversation with Mr. Heinke from the commissioners office during the time period Heinke fabricated his resume, and interview notes with Mr. Heinke were "no longer available" for at least two of the commissioners. These factors were significant in concluding that sufficient information to ultimately determine whether criminal laws were violated by Mr. Heinke and/or other individuals could only be accomplished through the identified resources of the investigating grand jury. They also showed that immediate action had to be taken to preserve any remaining evidence.

7. In addition to allowing for retrieval of any and all documents relevant to the investigation through the use of subpoena *duces tecum*, the grand jury now provided this office with the legal authority to compel testimony from witnesses who were unwilling to cooperate outside the grand jury investigation. For example, while Mr. Myers was unwilling to cooperate under normal investigative measures and retained an attorney, he agreed to talk to members of this office in a proffer setting made possible through the Grand Jury.
8. Once our investigation into the Heinke hiring began, several witnesses while testifying began to delve into the sale of Conestoga View. Those witnesses were reminded and the grand jury was admonished by Assistant District Attorney K. Kenneth Brown that such testimony was not relevant to the matter before the Investigating Grand Jury. However, because statements made by some of those individuals alleged possible violations of the law with regard to the sale of Conestoga View, this affiant made a decision to

independently begin a traditional investigation into the sale of Conestoga View Nursing Home by the Lancaster County Board of Commissioners and other individuals.

9. When members of this office began interviewing witnesses in regard to the sale of Conestoga View Nursing Home, many inconsistencies arose that could only be remedied by taking those witnesses before the Investigating Grand Jury and allowing the grand jury to make determinations as to credibility. This fact was clearly stated in the Amended Notice of Submission.
10. In addition to allowing the Grand Jury to make credibility determinations with regard to the aforementioned inconsistencies, this affiant determined it was necessary to place those witnesses under oath before the grand jury, with the understanding that they would face charges of perjury if they continued to be dishonest or deceptive.
11. In her Motion to Quash Subpoena, Commissioner Henderson makes an inflammatory and unsupported allegation that the Commonwealth is using the grand jury for improper political purposes, while proceeding at "a snail's pace" that will affect the spring 2007 Commissioner primary election. Counsel for Commissioner Shellenberger made a related allegation when he stated in a letter dated April 18, 2006 to this affiant that "the overtones and subsequent damage to the public trust of a grand jury investigation when none is warranted can be catastrophic." Both commissioners ignore the fact that by putting these issues before the Investigating Grand Jury and allowing the grand jury to operate in secrecy and without public scrutiny, the investigation into these matters should remain outside the public eye. They also fail to recognize that this grand jury investigation could exculpate as much as inculcate any person of interest.

12. Commissioners Henderson and Shellenberger also ignore the fact that the Commonwealth has in no way acknowledged the existence of an Investigating Grand Jury with regard to these specific issues or discussed this matter with any other entity. Rather, due to the direct and intentional actions taken by at least two county commissioners, including making statements immediately following appearances before the Grand Jury and issuing a public plea in the Lancaster Newspapers to speed up the investigation, the existence of this grand jury investigation and specific details have been disclosed to the news media.
13. To reiterate, the Grand Jury continues to operate under a cloak of secrecy and outside of the political arena. The only exceptions involve communication to the news media from county commissioners. The District Attorney's Office has never leaked any information to any source.
14. The District Attorney's Office has also not slowed the process in an effort to draw it out into the political season, as suggested by Commissioner Henderson. To the contrary, our office added one day in June and one day in July to the Grand Jury's normal schedule in an attempt to finish the investigation by July of 2006. There is no grand jury session scheduled for August, and our office clearly wanted to submit this investigation to the Grand Jury for a resolution prior to the political calendar. This affiant made that intent very clear to the Grand Jury Supervising Judge when the request was made to add the additional dates. With the added dates, the commissioners would have testified during the June session of the Grand Jury. Unfortunately, when Commissioners Shellenberger

and Henderson filed their Motions to Quash Subpoena, the process was delayed by at least one month and is now likely to extend into the political season due to their actions.

15. In conclusion, the county commissioners are clearly to blame for publicly acknowledging the fact that there is a grand jury investigation into the hiring of Gary Heinke; the county commissioners are clearly to blame for publicly acknowledging the fact that the sale of Conestoga View is also before the grand jury; the county commissioners are clearly to blame for any grand jury information that has been made public through the news media; and the county commissioners are clearly to blame for delaying the progress of this investigation into the upcoming political season.

Date: 7/12/06

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Sworn to and subscribed before

me this 12th day of July, 2006

Michelle M. Reed

Notary Public

My commission expires:

